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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 306

JOSEPHINE S. PEARCE, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 24, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket #96158

JOSEPHINE S. PEARCE, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

DOCKET ENTRIES

Appearances:

For taxpayer: Gordon S. P. Kleeberg, Esq.,
For Commissioner: Leonard A. Spalding, Jr., Esq.

1938

Nov. 15—Petition received and filed. Taxpayer notified. (Fee paid)
" 15—Copy of petition served on General Counsel.

1939

Jan. 11—Answer filed by General Counsel.
" 11—Request for Circuit hearing in New York City filed by General Counsel.
" 18—Notice issued placing proceeding on New York calendar. Service of answer and request thereon.
Sept. 19—Hearing set Nov. 13, 1939 at New York City.
Nov. 16—Hearing had before J. E. Murdock. Briefs as per rules. Stipulation of facts filed at hearing.
" 25—Transcript of hearing of 11/16/39 filed.
Dec. 15—Motion for extension of 20 days after Supreme Court decision in the Fitch case to file brief filed by General Counsel.
" 29—Brief filed by taxpayer.

[fol. 2] 1940

Jan. 10—Motion for extension of 20 days after Supreme Court decision in the Fitch case filed by General Counsel. 1/11/40 granted. Both parties.
Feb. 19—Brief filed by General Counsel.
" 20—Copy of brief served on General Counsel.

Mar. 4—Reply brief filed by taxpayer.
June 14—Opinion rendered, John E. Murdock, Div. 3. Decision will be entered for the respondent.
" 15—Decision entered, J. E. Murdock, Div. 3.
Sept. 6—Supersedeas bond in the sum of $1,300.00 approved and ordered filed.
" 12—Petition for review by U. S. Circuit Court of Appeals, 2nd Circuit, with assignments of error filed by taxpayer.
" 13—Proof of service filed by taxpayer.
Oct. 16—Agreed præcipe for record filed with proof of service thereon.

[fol. 3] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION.—Filed Nov. 15, 1938

The above named petitioner by Gordon S. P. Kleeberg, Esq., attorney at law of the State of New York, hereby respectfully petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols IT:A:1.JES-90D) dated November 2nd, 1938, and as a basis of her proceeding, respectfully alleges as follows:

1. The petitioner is a divorced woman, having obtained a divorce from her husband by decree dated January 13, 1917, and resides at 126 East 54th Street, in the Borough of Manhattan, City, County and State of New York.

2. The notice of alleged deficiency, a copy of which is attached and marked Exhibit "A" was mailed to the petitioner on November 2, 1938.

3. The tax in controversy is an alleged additional income tax liability or deficiency for the calendar year ending December 31, 1935 in the sum of $310.20 and for the calendar [fol. 4] year ending December 31, 1936, in the sum of $327.96.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

In determining the tax liability of the petitioner for the years 1935 and 1936, the Commissioner has erroneously

held that petitioner should be taxed upon income received from an annuity amounting to Six thousand ($6000) dollars in each of the taxable years ending respectively December 31, 1935 and December 31, 1936, which annuity was created for the sole purpose of insuring to petitioner, Five hundred ($500) dollars alimony per month during her life.

5. The facts upon which the petitioner relies as the basis of this proceeding, are as follows:

(a) In 1913, the taxpayer's husband, William G. Pearce, then living separate and apart from petitioner, but not legally divorced or separated by any decree of any court, set up a trust for his wife. The agreement recites that the parties were separated, and provided for monthly payments for her separate maintenance and support until the death of his wife (petitioner) or judgment of divorce, whereupon the trust was to terminate.

Sometime prior to January 13, 1917, and in the year 1915, petitioner moved from her then residence in New York, to the State of Texas, with the intention of acquiring a residence there, and suing her husband, the said William G. Pearce for a divorce.

(b) A supplemental agreement dated December 7th, 1916 (executed during the proceedings of a divorce suit then pending in the courts of Texas between the parties) provided that the obligation of the husband under the trust [fol. 5] agreement of 1913 above referred to, should terminate whenever he should have purchased for the benefit of his wife, the plaintiff in that divorce suit, an annuity under which, in lieu of the monthly payments provided for in the agreement of 1913, for her separate maintenance and support, she would receive five hundred ($500) dollars monthly as alimony, for life.

(c) One month later, and on January 13th, 1917, a decree of divorce was entered in the wife's (petitioner) favor, in a court in the State of Texas, having jurisdiction of the parties.

(d) On May 1, 1917, William G. Pearce, petitioner's husband, purchased for $82,953.53, an annuity for the benefit of his divorced wife, petitioner, Josephine S. Pearce, whereby she was to receive the sum of Five hundred ($500) dollars a month for her maintenance and support (in lieu of any other alimony) for the rest of her life, the first monthly

payment to be made June 1, 1917, and upon the death of the annuitant (petitioner), all liability of the Travelers Insurance Company from whom the annuity had been purchased, should cease, with no payment to be made at or after that time of principal or income. Petitioner had no power of disposition over the corpus of this fund during her life or by testamentary disposition or otherwise. The Actuaries of the Insurance Company figured her expectancy of life at $82,953.53 to return $500.00 monthly.

(e) The above mentioned William G. Pearce is still alive.

Wherefore, petitioner respectfully prays that this Honorable Board may hear the proceeding and determine that there is no deficiency due from the petitioner for the years 1935 and 1936.

Petitioner also respectfully prays that this case may [fol. 6] be placed on the Circuit Division of this Honorable Board and heard in the City of New York.

Josephine S. Pearce, Petitioner.

Gordon S. P. Kleeberg, Counsel for Petitioner, 300 Madison Avenue, Manhattan, New York, N. Y.

Duly sworn to by Josephine S. Pearce. Jurat omitted in printing.

[fol. 7] EXHIBIT "A" TO PETITION

Treasury Department

Office of Commissioner of Internal Revenue

Nov. 2, 1938.

Mrs. Josephine S. Pearce
126 East 54th Street,
New York, New York.

MADAM:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1935 and 1936 discloses a deficiency of $638.16 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates [fol. 8] thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, By (S) John R. Kirk, Deputy Commissioner.

Enclosures: Statement Form of Waiver.

Statement

IT:A:1
JES-90D

Mrs. Josephine S. Pearce,
126 East 54th Street,
New York, New York.

Tax Liability for Taxable Years Ended December 31, 1935 and 1936

Income Tax

Year	Liability	Assessed	Deficiency
1935	$310.20	None	$310.20
1936	327.96	None	327.96
Total	$638.16		$638.16

In making this determination of your income tax liability careful consideration has been given to the internal revenue auditor's report dated December 22, 1937 and to your representative's letter dated January 22, 1938.

[fol. 9] A copy of this letter has been mailed to your representative, Mr. William A. Cambell (sic) C. P. A. and Gordon S. P. Kleeberg, Esq., 51 East 42nd Street, New York, New York, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

Adjustment to Net Income

1935

Net income as disclosed in return	$1,444.00
Additional income:	
(a) Annuity	6,000.00
Net income adjusted	$7,444.00

Adjustment to Net Income

1936

Net income as disclosed in return	$1,444.00
Additional income:	
(a) Annuity	6,000.00
Net income adjusted	$7,444.00

Explanation of Adjustment

(a) With respect to the annuity you are advised that since annual payments received by you are in excess of the cost of the annuity, the entire payment of $6,000.00 received by you in each of the above taxable years is held by the Bureau to be taxable.

[fol. 10] Computation of Tax

1935

Net income adjusted		$7,444.00
Less:		
Personal exemption		1,000.00
Surtax net income		$6,444.00
Less:		
Dividends	$444.00	
Earned income credit (10% of $3,000.00)	300.00	744.00
Net income subject to normal tax		$5,700.00
Normal tax at 4% on $5,700.00		$ 228.00
Surtax on $6,444.00		102.20
		$ 330.20

Less:	
Income tax paid at source	20.00
Correct income tax liability	$ 310.20
Income tax assessed, original account #662602	none
Deficiency of income tax	$ 310.20

Computation of tax

1936

Net income adjusted	$7,444.00
Less:	
Personal exemption	1,000.00
Surtax net income	$6,444.00
[fol. 11] Less:	
Earned income credit (10% of $3,000.00)	300.00
Net income subject to normal tax	$6,144.00
Normal tax at 4% on $6,144.00	245.76
Surtax on $6,444.00	102.20
	$ 347.96
Less:	
Income tax paid at source	20.00
Correct income tax liability	$ 327.96
Income tax assessed, original, account #664793	none
Deficiency of income tax	$ 327.96

BEFORE UNITED STATES BOARD OF TAX APPEALS

ANSWER—Filed January 11, 1939

The respondent, by his attorney, J. P. Wenchel, Chief Counsel for the Bureau of Internal Revenue, for answer to the petition heretofore filed in this proceeding, admits and denies as follows:

[fol. 12] 1. Admits that the petitioner resides at 126 East 54th Street, in the Borough of Manhattan, City, County and

State of New York, but denies the remaining allegations contained in Paragraph 1 of the petition.

2. Admits the allegations contained in Paragraph 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar years 1935 and 1936; denies the remaining allegations contained in Paragraph 3 of the petition.

4. Denies that the Commissioner erred as alleged in Paragraph 4 of the petition.

5. (a) through (e) Denies the allegations of fact set forth in subparagraphs (a), (b), (c), (d), and (e) of Paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore it is prayed that the taxpayer's appeal be denied and the deficiency as shown in the deficiency notice be in all things approved.

(Signed) J. P. Wenchel, ECA. Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

E. O. Hanson, Division Counsel. Leonard A. Spalding, Jr., Special Attorney, Bureau of Internal Revenue. LAS/drc 1/10/39.

[fol. 13] Before United States Board of Tax Appeals

Stipulation of Facts—Filed at Hearing November 16, 1939

It is Hereby Stipulated and Agreed by and between the parties hereto by their respective attorneys, that the following is a correct statement of the facts involved in the above proceeding, and may be introduced in evidence by either party without further proof thereof:

1. Petitioner is alive, and resides at 126 East 54th Street, Manhattan, New York City.

2. William G. Pearce, former husband of petitioner, is alive and resides at 580 Park Avenue, Manhattan, New York City.

3. Petitioner and said William G. Pearce were lawfully married at Sedalia, Missouri, and continued to live together as husband and wife until on or about November 7th, 1913, at the City of New York, State of New York, when, by reason of the treatment and conduct of said William G. Pearce toward petitioner, she was compelled to permanently abandon him since which time they have not lived together as husband and wife.

No children were born of the said marriage of the petitioner and William G. Pearce either before or after the said decree of divorce hereinafter referred to.

4. Thereupon, in 1914, petitioner moved to the home of a cousin in Dallas, Texas, and continuously resided there, [fol. 14] while William G. Pearce, her husband, resided in New York City.

5. That thereafter and on December 9th, 1916, petitioner instituted a suit for divorce against said William G. Pearce in the District Court of Dallas County, State of Texas, which received docket number 24597, and the said William G. Pearce duly entered his personal appearance in said law suit and waived the issuance of process and service thereof upon him. A true copy of such appearance dated December 16, 1916, is hereunto annexed, marked Exhibit "A", and the only prayer in said petition contained, is as follows:

"Wherefore, plaintiff prays the court that defendant be cited to appear and answer this cause of action, and that upon final hearing she be given judgment dissolving the said marriage relation, and for all costs of suit."

6. That thereafter the said William G. Pearce also appeared in said proceedings by attorney and such proceedings were regularly and duly had that on January 13, 1917, a decree of absolute divorce was duly entered in favor of petitioner against said William G. Pearce in said law suit docket number 24597, a true copy of which decree, is hereunto annexed, marked Exhibit "B".

7. On December 6, 1913, at the City of New York, State of New York, while the petitioner was living separate and apart from her said husband, but not legally divorced or separated by any decree of any court, the said William G.

Pearce set up a trust for his wife with Broadway Trust Company, as Trustee, whereby she was to receive $350.00 a month for her life. A true copy of said Trust Agreement is hereunto annexed, marked Exhibit "C".

[fol. 15] 8. On December 7th, 1916, petitioner and said William G. Pearce executed a "Supplemental Agreement" dated that date, a true copy of which is hereunto annexed, marked Exhibit "D".

9. That pursuant to the terms of the Supplemental Agreement, Exhibit "D" above referred to, the said William G. Pearce on May 1, 1917, purchased from Travelers Insurance Company of Hartford, Connecticut, for $82,953.53, a straight life annuity No. 407689, for the benefit of his divorced wife, petitioner herein, of which annuity contract she is presently possessed today and from which she has been receiving $500.00 a month since June 1st, 1917, the date of the first payment stated in the annuity contract and all parties to said supplemental agreement complied with all the terms and conditions on their part required to be performed.

10. A true copy of said an-uity contract is hereunto annexed, marked Exhibit "E".

Gordon S. P. Kleeberg, Counsel for Petitioner. J. P. Wenchel, ECA, Chief Counsel for the Bureau of Internal Revenue.

[fol. 16] EXHIBIT "A" TO STIPULATION OF FACTS

In the District Court of Dallas County, Texas, For and in the 68th Judicial District of Texas

No. 24597-C

JOSEPHINE S. PEARCE

v.

WILLIAM G. PEARCE

I, William G. Pearce, defendant in the above styled and numbered cause, do waive the issuance of process and service thereof, and do enter my appearance in said suit and do hereby agree that said case may be taken up, heard

and disposed of at any time that may suit the convenience of the court.

William G. Pearce.

Subscribed and sworn to before me, this the 16th day of December, A. D. 1916. Alexander L. Hillyard, Notary Public in and for New York County, New York, Notary Public, Kings Co. Certificate filed in New York Co.

[fol. 17] EXHIBIT "B" TO STIPULATION OF FACTS

24597

JOSEPHINE S. PEARCE

VS.

WILLIAM G. PEARCE

Entered As of January 13, 1917

On this day coming on to be heard the above entitled and numbered cause, and the plaintiff appearing in person and by attorney, and the defendant William G. Pearce having also entered his personal appearance and appearing also by his attorney, and the Jury was waived by both parties, who announced ready for trial, and the Court having heard the pleadings, evidence and argument of Counsel, is of the opinion that the material allegations in plaintiff's petition are true.

It is, therefore, ordered, adjudged and decreed by the Court that the bonds of Matrimony heretofore existing between said plaintiff and defendant be, and the same are hereby annulled and dissolved and that the said plaintiff be and she is hereby divorced from the said defendant.

It is further ordered by the Court that said plaintiff do have and recover of said defendant all costs in this behalf expended, for which she may have her execution. It is further ordered that execution shall issue in favor of the offices of the Court against each party respectively for the costs by her or him in this behalf incurred.

W. F. Whitehurst, Judge, 68th District Court.

[fol. 18] THE STATE OF TEXAS,
County of Dallas:

I, Geo. W. Harwood, Clerk of the District Courts, in and for the County of Dallas, and State of Texas, do hereby certify, that the above and foregoing is a true and correct copy of Divorce Decree in the above numbered and styled cause, as the same appears of record in Book 13 page 422, of the Minutes of the 68th Judicial District of Texas, in and for Dallas County.

Witness my official seal and signature, at office in the City of Dallas, Dallas County, Texas, on this the 11th day of Feb. 1935.

Geo. W. Harwood, Clerk of the District Courts, Dallas County, Texas, By Thomas Goforth, Deputy.

EXHIBIT "C" TO STIPULATION OF FACTS

Memorandum of Agreement made this sixth day of December, 1913 by and between William G. Pearce, of the City of New York, party of the first part, Josephine S. Pearce, party of the second part, and Broadway Trust Company, a corporation organized under the laws of the State of New York, and its successor or successors, as trustee, party of the third part, hereinafter referred to as "trustee"; witnesseth:

Whereas, the party of the first part, husband of the party of the second part, now resides at the Metropolitan Club, in the City of New York, and has resided there since on or about November 7, 1913, and the party of the second part, [fol. 19] the wife of the party of the first part, is now residing temporarily in the City of New York, but separate and apart from the party of the first part, and is about to remove from said city; and

Whereas, the said parties of the first and second parts have permanently separated from each other, and are now and have been since said last mentioned date continually living separate and apart from each other; and

Whereas, the party of the first part desires to make provision, to the extent of Three hundred and fifty dollars ($350) a month, through the party of the third part as trustee, for the separate support and maintenance of the

party of the second part, under certain terms and conditions mutually agreeable to the parties of the first and second parts, and hereinafter set forth;

Now, therefore, each of the parties hereto in consideration of the mutual promises hereinafter contained and in further consideration of the sum of One Dollar each to the other in hand paid, receipt whereof is hereby acknowledged, do agree as follows:

1. The party of the first part agrees to cause to be transmitted to the party of the second part through the trustee, the sum of Three hundred and fifty dollars ($350) on the first day of each month while this agreement is in force and effect.

2. The party of the first part agrees to and does hereby assign and deliver in trust simultaneously with the execution of this agreement, to the trustee, the following securities, and does hereby authorize the trustee to cause said securities to be transferred to the name of the party of the third part as trustee:

[fol. 20] 700 shares of the common capital stock of Griffin Wheel Company, a corporation organized and existing under the laws of the State of Massachusetts,

said securities being so assigned and delivered in trust to the trustee for the following purposes:

(a) To receive the dividends, interest, or other payments, now or hereafter to become due and payable thereon, whether by way of earnings or otherwise.

(b) To disburse the proceeds received by reason of holding said securities, in the manner, at the times, and to the parties, as provided in this agreement.

(c) To reassign and deliver to the party of the first part or his personal representatives, said securities or any securities substituted therefor as hereinafter provided, upon the termination of this agreement.

3. The party of the first part agrees, in the event that the trustee shall not, upon the 25th day of any month, have in hand the sum of Three hundred and fifty dollars ($350), income from said securities, but he will, upon due notification from the trustee, pay to the trustee on or before the

first day of the month succeeding said 25th day, a sum sufficient to increase the moneys in possession of said trustee, subject to the provisions of this agreement, to the sum of Three hundred and fifty dol-ars ($350).

4. The party of the first part agrees to assign and deliver other securities in trust to the trustee for the purposes hereinbefore stated when duly demanded by the trustee under the provisions of paragraph eleven of this agreement.

[fol. 21] 5. The party of the first part agrees to pay all charges of the trustee for any services rendered and disbursements incurred by the trustee under the terms of this agreement.

6. The party of the second part agrees to accept the provisions for payments to be made to her contained in this agreement in lieu of any and all inchoate rights of dower or any other rights now possessed by her, or which she may hereafter possess in the real estate of the party of the first part, or in any property, whether real or personal, now jointly owned by the parties of the first and second parts, and in lieu of any and all claims for support and maintenance and demands of every kind and character; and the party of the second part hereby agrees to execute and deliver on demand any and all instruments that may be needful or proper for carrying into effect any of the provisions of this paragraph; and the party of the second part agrees that she will not at any time hereafter contract any debt or debts in the name of the party of the first part or for which he or his estate shall or may be liable or answerable.

7. The party of the second part agrees that, whenever, in any calendar year the trustee shall have received, under the provisions of this agreement, an amount in excess of four thousand two hundred dollars ($4200), the trustee shall pay such excess to the party of the first part; provided, however, that any receipts by the trustee from the sale of any of the securities under the provisions of paragraph eleven of this agreement shall not be considered in estimating said excess.

8. The party of the second part agrees that the party of the first part may substitute other securities of equal or greater value in the place of any securities assigned and [fol. 22] delivered to the trustee under the terms of this

agreement, upon the terms and conditions provided in para-*para*graph twelve of this agreement.

8a. The party of the second part further agrees that so long as the party of the first part shall perform the obligations assumed hereunder, the trustee shall, upon demand, of the party of the first part execute a proxy or proxies in favor of the party of the first part, permitting said last mentioned party to vote in his discretion upon all the certificates of stock held by the trustee hereunder.

9. The Trustee agrees:

(1) To hold possession under the terms of this agreement of the securities delivered to it by the party of the first part hereunder.

(2) To receive dividends, interest or other payments upon said securities and the moneys paid by the party of the first part under the provisions of paragraph three of this agreement.

(3) To pay the proceeds thereof in the following manner:

(a) So much as may be necessary and so far as the moneys received under this agreement will suffice, to liquidate the obligations assumed herein by the party of the first part.

(b) To the party of the first part any excess of moneys received by the trustee, such excess to be determined by the provisions of paragraph seven of this agreement.

10. The trustee agrees in the event that it has not on hand, under the terms of this agreement, the sum of Three hundred and fifty ($350) upon the 25th day of any month, [fol. 23] forthwith to serve notice of such fact in writing upon the party of the first part, and shall demand that the party of the first part shall pay over to the trustee the amount of such deficiency on or before the first day of the month succeeding.

11. The trustee agrees in the event that the party of the first part, after due notification of any such deficiency by the trustee, shall not have duly placed the trustee in funds wherewith to make any payment due the party of the second part, the trustee may, on request of the party of the second part, sell at public auction the securities trans-

ferred to it by the party of the first part, or such portion thereof as will realize an amount equal to such deficiency, and may apply the proceeds of such sale in liquidation of the obligations assumed herein by the party of the first part. In the event that the trustee shall, under the provisions of this paragraph, exercise its right to sell any of the securities assigned and delivered to it in trust herein, the trustee shall immediately thereafter mail a demand in writing, addressed to the party of the first part requiring said party forthwith to assign and deliver to said trustee in trust other security equal in market value to the difference between the value of the security sold as fixed by said sale and the par value of said security, less such deficiency.

12. The trustee agrees that, in the event the party of the first part shall notify the trustee in writing that he desires to substitute other securities in place of any of the securities delivered to the trustee hereunder, forthwith to mail a copy of such notification to the party of the second part. In the event that the party of the second part is in doubt regarding the sufficiency of the security proposed to be substituted, she shall, within ten days after the [fol. 24] date of said notice, notify the trustee in writing, of the name of some certain trust company in the City of New York or Chicago, Ill., to whom she desires the question of the value of said security to be submitted. Upon receipt from the party of the second part of the name of said trust company, the trustee shall request in writing, the opinion of said trust company upon the fair value of the securities offered in substitution. Upon receipt from said trust company of its opinion of the fair value of said securities, the trustee shall exchange said securities providing the securities proposed to be substituted are valued by said trust company at a value equal to or greater than the securities which the party of the first part has requested be reassigned and delivered to him. In fixing the relative values of said securities the trustee shall fix the value of the securities assigned and delivered herein at their par value, and the value of the securities proposed to be substituted at the valuation placed upon them by the trust company selected by the party of the second part. In the event that the trustee shall not have received from the party of the second part the name of a trust company

to whom the question of the value of said securities may be submitted, within thirty days after said trustee has duly notified the party of the second part that the party of the first part has proposed to substitute securities as aforesaid, the party of the second part shall be deemed to have consented to such substitution and the trustee shall make such substitution within a reasonable time thereafter.

13. In the event that the party of the second part shall have contracted any debt or debts subsequent to the execution of this agreement, and judgment or judgments therefor shall have been obtained against the party of the first part, or his estate, all the parties hereto agree that the [fol. 25] trustee shall satisfy said judgment or judgments out of the moneys payable to the party of the second part under the terms of this agreement, and the trustee shall withhold all payments hereunder to the party of the second part until said judgment shall be fully satisfied and discharged, and until the trustee shall have received a satisfaction or satisfactions of said judgment or judgments.

14. All of the parties hereto agree that this agreement shall remain in force and effect during the life of the party of the second part, unless prior to the death of said party she shall have obtained a decree of absolute divorce from the party of the first part, in which event the parties hereto shall be released from all obligations thereunder.

15. All of the parties hereto agree that whenever in this agreement it is provided that any notification in writing shall be sent by any of the parties hereto, said notification shall be sent by registered mail to this following addresses:

The party of the first part: 30 Church Street, New York City;

The party of the second part: % C. O. Maas, 87 Nassau Street, New York City;

The party of the third part: Woolworth Building, New York City.

In the event that the party of the first part or the party of the second part, desires notifications to be forwarded to respective addresses other than those above set forth, notifications of such new addresses shall be given by registered mail to the trustee, and the trustee shall not be obli-

gated to forward notifications to said changed addresses until five days have elapsed after the receipt of said notifications of change.

[fol. 26] 16. All the parties hereto agree that this agreement shall not be deemed to be terminated until a duly authenticated copy of a public record either of the death of the party of the second part, or of the judgment of absolute divorce against the party of the first part shall be filed with the trustee herein.

17. All of the parties hereto agree that in the event this agreement shall cease and determine in either of the manners hereinbefore set forth, the trustee shall reassign and deliver to the party of the first part, his executors, administrators or assigns, the securities assigned by him in trust to the trustee, and all moneys received by or paid to the trustee and not yet expended or due to be expended under the terms of this agreement.

18. The trustee shall not be liable, either to the party of the first or second parts, for any act or omission providing it acts in good faith.

19. All of the parties hereto agree that this agreement shall bind the executors, administrators, successors, and assigns of the respective parties hereto.

In Witness Whereof, all of the parties hereto have affixed their hands and seals, in triplicate, in the City of New York on the day and year first above written.

William G. Pearce, L. S.; Josephine S. Pearce, L. S.; Broadway Trust Company, by John Williams, Treas. (Seal.)

Attest: G. A. Gentes, Secretary.

[fol. 27] State of New York,
County of New York, ss:

On this 6th day of December 1913, before me personally came John Williams who being by me duly sworn, did depose and say, that he resides in City of New York, that he is the treasurer of Broadway Trust Company, the corporation described in and which executed the foregoing

instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

Ed. E. McMahon, Jr., Notary Public, N. Y. Co. No. 2732; New York Register, No. 5084. Term expires March 30, 1915. (Seal.)

EXHIBIT "D" TO STIPULATION OF FACTS

Memorandum of Supplemental Agreement made this 7th day of December, 1916, by and between William G. Pearce, of the City of New York, party of the first part, Josephine S. Pearce, party of the second part, and Broadway Trust Company, a corporation organized under the laws of the State of New York, and its successor or successors, as trustee, party of the third part, hereinafter referred to as "trustee", witnesseth:

Whereas, the parties hereto entered into an agreement on the 6th day of December, 1913, by the provisions of which party of the first part deposited with trustee certain securities the income from which was, up to the amount of Three Hundred and Fifty Dollars ($350) a month to [fol. 28] be paid by trustee to party of the second part during her life, and party of the first part agreed in the event the said deposited securities did not yield an income at least equal to said monthly payments due to party of the second part under said agreement, to pay to trustee, when duly notified, the amount of such deficiency; and

Whereas, party of the first part is willing to deposit additional securities with the trustee and to provide for an increase in monthly payments to party of the second part so that such total payments shall equal Five Hundred Dollars ($500) a month, provided, in consideration thereof, party of the second part agrees that the obligations of the party of the first part and trustee to the party of the second part under said agreement of December 6th, 1913, and under this supplemental agreement shall terminate whenever party of the first part shall have purchased for the benefit of party of the second part and party of the second

part shall have received from trustee an annuity agreement issued by a specified insurance company, by the terms of which annuity agreement said insurance company binds itself to pay to party of the second part during her life the sum of Five hundred dollars ($500) monthly,

Now, therefore, each of the parties hereto, in consideration of the mutual promises hereinafter contained, and in further consideration of the sum of one dollar, each to the other in hand paid, the receipt whereof is hereby acknowledged, do agree to the following modifications of said agreement dated December 6th, 1913:

I. In paragraph numbered "1" upon page 2 of said agreement, in lines 3 and 4 of said paragraph "Three hundred and fifty dollars ($350)" is stricken out and "Five Hundred Dollars ($500)" is substituted therefor.

[fol. 29] II. In paragraph numbered "2" upon page 2 of said agreement, in line 7 of said paragraph the figures "700" are stricken out and the figures "1000" are substituted therefor.

III. In paragraph numbered "3" upon page 2 of said agreement, in lines 3 and 4 of said paragraph "Three hundred and fifty Dollars ($350)" is stricken out and "Five Hundred Dollars ($500)" is substituted therefor; and in lines 9 and 10 of said paragraph "Three hundred and fifty Dollars ($350)" is stricken out and "Five Hundred Dollars ($500)" is substituted therefor.

IV. In paragraph numbered "7" upon page 3 of said agreement, in line 4 of said paragraph "Four thousand two hundred dollars ($4200)" is stricken out and "Six thousand Dollars ($6000)" is substituted therefor.

V. In paragraph numbered "10" upon page 4 of said agreement, in line 3 of said paragraph "Three hundred and Fifty Dollars ($350)" is stricken out and "Five Hundred Dollars ($500)" is substituted therefor.

VI. Paragraph 14 of said agreement, and all of the same is entirely stricken out, and the following substituted therefor:

All of the parties hereto agree that this agreement shall remain in force and effect during the life of the party of the second part, unless prior to the death of said party,

the party of the first part, or his representatives shall have purchased, and shall have deposited with the trustee herein an annuity agreement in standard form of one of the following insurance companies, to pay to the party of the second part during her life upon a day certain in each month the sum of Five Hundred Dollars ($500):

[fol. 30] Aetna Life Insurance Company,
The Travellers Insurance Company,
Metropolitan Life Insurance Company,
The Equitable Life Assurance Society of the United States,
The Mutual Life Insurance Company of New York,
New York Life Insurance Company.

VII. Paragraph numbered "16" upon page 7 of said agreement is stricken out and the following is substituted therefor:

16. All of the parties hereto agree that this agreement shall terminate when a duly authenticated copy of a public record of the death of the party of the second part shall have been filed with the trustee herein or when an annuity agreement as described in paragraph "VI" of this supplemental agreement shall have been deposited with the trustee herein.

VIII. In paragraph numbered "17" upon page 8 of said agreement, the following is added at the end of said paragraph:

And in the event an annuity agreement shall have been deposited with the trustee herein, as provided in paragraph "VI" of this supplemental agreement, said annuity agreement shall forthwith be transmitted by the trustee to the party of the second part.

IX. It is further agreed that nothing in this supplemental or in the aforesaid original agreement contained shall be construed as relieving the party of the first part from his personal obligation which is herewith distinctly assumed by him during the life of this agreement to pay or cause [fol. 31] to be paid unto the party of the second part the sum of $500 during every month and that such personal obligation shall only cease and determine in the event that an annuity agreement, as hereinabove provided, shall have been deposited with the trustee herein.

In witness whereof, all of the parties hereto have affixed their hands and seals, in triplicate, in the City of New York on the day and year first above written.

Witness as to William G. Pearce:
Alexander L. Hillyard.

Witness as to Josephine S. Pearce:
Charles O. Maas.

William G. Pearce. (L. S.) Josephine S. Pearce. (L. S.) Broadway Trust Company, by John Williams, Treas.

Attest:
Herman W. Willis.

STATE OF NEW YORK,
County of New York, ss:

On this 15th day of January 1917 before me personally came John Williams who being by me duly sworn did depose and say, that he resides in Montclair, N. J., that he is the Treasurer of Broadway Trust Company, the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors [fol. 32] of said corporation, and that he signed his name thereto by like order.

Herman W. Willis, Notary Public, Kings Co.; Kings County Clerk's No. 116; Kings County Register's No. 7008; Certificate filed in N. Y. County; N. Y. County Clerk's No. 28; N. Y. Register's No. 7055. Term expires March 30th, 1917.

EXHIBIT "E" TO STIPULATION OF FACTS

Number 407689 Description Life Annuity

The Travelers Insurance Company
of Hartford, Connecticut

Amount	Premium
$500 Monthly	$82,953.50

In Consideration of Eighty-two Thousand Nine Hundred Fifty-three 50/100 Dollars, paid to the Company for the purchase of a annuity on the life of Josephine S. Pearce

(hereinafter called the Annuitant) of New York, County of New York in the State of New York does hereby promise to pay to the Annuitant or her assigns Five Hundred Dollars on the First day of each month in each and every year during the natural life of the Annuitant, upon receipt [fol. 33] and approval by the Company of proof that the Annuitant is living on each of such days, the first payment to be made on the First day of June 1917.

This annuity is granted and accepted upon the Declaration of William G. Pearce, the applicant, that the Annuitant was born on the Ninth day of December 1861.

In Witness Whereof, The Travelers Insurance Company has caused these presents to be signed by its President and a Secretary, at Hartford, Conn., this First day of May 1917.

C. Butler, President.

J. S. Scott, Department Secretary.

[Endorsement on Back]

Life Annuity

No. 407689

The Travelers Insurance Company
Hartford, Connecticut

Annuity during the Life of
Josephine S. Pearce

When Payable
1st Day of each Month.

[fol. 34] BEFORE UNITED STATES BOARD OF TAX APPEALS

Income—Obligation of Husband to Support Wife.—Income which the petitioner received under an annuity contract purchased for her by a former husband from whom she was divorced in Texas, was taxable to her in the absence of evidence showing that there was some continuing liability on the part of her husband to support or maintain her.

Gordon S. P. Kleeberg, Esq., for the petitioner.
Leonard A. Spalding, Jr., Esq., for the respondent.

OPINION—Promulgated June 14, 1940

Murdock: The Commissioner determined deficiencies of $310.29 and $327.96 in the income tax of the petitioner for the calendar years 1935 and 1936. The Commissioner, in determining the deficiency for each year, added to the income disclosed on the return $6,000 representing an amount received by the petitioner during the taxable year under an annuity contract purchased for her benefit by her divorced husband. The propriety of the addition of the $6,000 is the only issue for decision by the Board. The Board adopts as its findings of fact the stipulation of the parties.

[fol. 35] The petitioner and William G. Pearce were married in Misouri and lived as husband and wife until the latter part of 1913, at which time they separated. The husband then set up a trust for his wife's support and mainfenance, under which she was to receive $350 a month. He guaranteed the payments in case the income of the trust was insufficient. Their agreement was changed in December 1916 to provide a monthly income for the petitioner of $500 and to provide that, should the husband purchase for the petitioner an annuity in one of six named insurance companies paying her $500 per month for the remainder of her life, she would agree to the termination of the trust and thereafter her husband would be under no personal obligation to pay or cause to be paid to her any further sum. The petitioner obtained a divorce in Texas in January 1917. The divorce was absolute. They had no children. She sought no alimony and none was provided. The divorce decree made no mention of the agreements between the petitioner and her husband. It contained no provision reserving jurisdiction to later grant alimony or modify the decree in any way. The former husband purchased an annuity in May 1917 from the Travelers Insurance Co., which was one of the six companies named. The annuity was for the payment of $500 monthly to the petitioner for her life. The annuity was transferred to her and she gave the release which she had agreed to give. The trust was

terminated and the corpus was returned to the husband. The petitioner is still in possession of the annuity and received during the taxable years $500 a month.

The sole contention of the petitioner is that the amounts in controversy are not taxable to her because they are taxable to her former husband. The respondent has conceded that the income is not taxable to the former husband. See *William G. Pearce,* Docket No. 98004, heard at [fol. 36] the same time this case was heard. He contends there that the law of Texas, the agreement of the parties, and the annuity have given the divorced husband full discharge and leave no contingent obligation upon him with respect to his wife. He concludes that, under the recent decision of the Supreme Court in *Helvering* v. *Fitch,* 309 U. S.— (1/29/40), the amounts are taxable to the wife, the present petitioner. See also *Helvering* v. *Fuller,*—U. S.— (4/22/40).

Counsel for the petitioner contends that it has not been established in the present record upon clear and convincing proof and beyond mere inferences and vague conjectures that the husband was completely discharged under the laws of Texas by the arrangement made with his wife. He says it may not be assumed that under the laws of Texas the Texas court could not step in, upon failure for some reason of the annuity payments, and require the husband to support the petitioner. This case is different from the *Fitch* case, *supra,* and also from *Helvering* v. *Leonard,*— U. S.—(4/22/40), in one respect which is quite important in so far as this contention of the petitioner is concerned. The difference is that in the *Fitch* and *Leonard* cases the taxpayer seeking to escape the tax was the husband, and any failure of proof or uncertainty was to his disadvantage, whereas here the taxpayer seeking to escape the tax is the wife, and any failure of proof or uncertainty is to her disadvantage. She has failed to show that the determination of the Commissioner is incorrect. The facts, on the contrary, tend to support the determination of the Commissioner.

Decision will be entered for the respondent.

[fol. 37] BEFORE UNITED STATES BOARD OF TAX APPEALS

DECISION—Entered June 15, 1940

Pursuant to the determination of the Board, as set forth in its Opinion, promulgated June 14, 1940, it is

Ordered and Decided: That there are deficiencies in income tax of $310.20 and $327.96 for the years 1935 and 1936, respectively.

Enter: Entered June 15, 1940.

(S.) J. E. Murdock, Member. (Seal.)

[fol. 38] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition for Review—Filed September 12, 1940

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes the Taxpayer, petitioner in this cause, Josephine S. Pearce by her counsel, Gordon S. P. Kleeberg, and being aggrieved by the Opinion, Decision and Order of the United States Board of Tax Appeals rendered against her on June 15th, 1940, pursuant to the determination of the said Board as set forth in its opinion promulgated June 14th, 1940, in the case of Josephine S. Pearce, petitioner, against the Commissioner of Internal Revenue, respondent, #96158 on the docket of the said Board, by which the said Board determined that there is a tax deficiency due from said petitioner for the years 1935 and 1936 in the amounts of $310.20 and $327.96 respectively, hereby respectfully submits her petition for a review thereof by the United States Circuit Court of Appeals for the Second Circuit and in support of this, her petition, filed in pursuance of the provisions of Sections 1141 and 1142 of the Internal Revenue Code approved February 10th 1939, respectfully shows to this Honorable Court, as follows:

[fol. 39] I. DESIGNATION OF COURT OF REVIEW

Petitioner on review is an individual and is a resident of the Borough of Manhattan, City, County and State of New York.

Petitioner duly filed a Federal Income Tax Return for the calendar years 1935 and 1936 with the Collector of Internal Revenue for the Third District of New York with offices located in New York City and within the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit.

Petitioner being aggrieved by the opinion, decision and order of the United States Board of Tax Appeals in the above entitled cause and the Collector's office to which were made the returns of income tax in respect of which the liability in controversy arises, being located within the Second Judicial Circuit, petitioner desires a review of the said opinion, decision and order in accordance with the provisions of Sections 1141 and 1142 of the Internal Revenue Code approved February 10th 1939, by the United States Circuit Court of Appeals for the Second Circuit.

II. Prior Proceedings

The Commissioner of Internal Revenue determined a tax deficiency against the petitioner for the taxable years ending December 31st 1935 and December 31st 1936, in the amounts of $310.20 for 1935 and $327.96 for 1936, and sent the petitioner a notice of such alleged income tax deficiency. Subsequently, on November 15, 1938, the petitioner filed with the United States Board of Tax Appeals, a petition appealing from such determination, contesting the entire amount of said deficiency so determined by the Commissioner of Internal Revenue. Thereafter, the Commissioner filed an answer to the said petition admitting the jurisdictional facts set forth therein, and entering an admission of [fol. 40] certain facts and a denial as to other facts set forth in petitioner's contention that there was no deficiency in the said income tax for the calendar years 1935 and 1936.

Thereafter, the matter came on for hearing before the United States Board of Tax Appeals at a Division sitting at New York City, N. Y., on November 16th, 1939. At the hearing, all of the material facts were stipulated and a stipulation of facts with relevant exhibits attached was duly filed with the Board at that time.

Thereafter, briefs were filed with the permission of the Board, a brief for the petitioner, a brief for the Commissioner-respondent, and a reply brief for the petitioner, and thereafter and on June 14th 1940, the Board promulgated its opinion and on June 15th 1940, entered its decision

wherein it was ordered and decided that there was a deficiency in Federal income tax against said petitioner for the calendar year 1935 in the sum of $310.20 and the calendar year 1936 in the sum of $327.96.

On September 6th 1940, the supersedeas bond of petitioner in the amount of $1300.00 was duly approved and filed as of said date.

III. Nature of Controversy

The controversy involves the taxability to petitioner for the calendar years 1935 and 1936 of moneys which she received from an annuity purchased for her some years previous in substitution of alimony. Briefly, the facts are as follows:

Petitioner and her former husband, William G. Pearce were married in Missouri and lived together until about November 1913 at the City of New York, when and where, because of her husband's conduct, petitioner left him and they have not lived together as husband and wife since. [fol. 41] In 1914, petitioner moved to Texas and resided there continuously and in December 1916, sued her husband for a divorce in the courts of Texas, at which time her husband duly entered his personal appearance as well as appearing by attorney. Such proceedings were thereafter duly had, resulting in a divorce in petitioner's favor by decree entered January 13th 1917.

On December 6th 1913, at the City of New York, while petitioner lived separate and apart from her husband but not legally divorced or separated by any decree of any court, the said William G. Pearce set up a trust for his wife with a Trust Company in New York City, as trustee, whereby she was to receive $350.00 a month for life.

December 7th 1916, two days before the institution of the divorce suit in Texas, a supplemental agreement was executed at the City of New York between husband and wife and pursuant to the terms of that agreement, on May 1st 1917, some months after the entry of the divorce decree in Texas, the said William G. Pearce purchased from Travelers Insurance Company of Hartford, Connecticut, a straight life annuity for the benefit of his divorced wife, petitioner herein, of which annuity contract she is presently possessed today and from which she receives $500.00 a month, since June 1st 1917.

This annuity was created for the sole purpose of insuring to petitioner $500.00 a month for her support and maintenance during her life. The Board of Tax Appeals has held that the moneys received on this annuity for the years 1935 and 1936, ($6000.00 in each year) are taxable to the petitioner. The propriety of the addition of this $6000.00 to such other income as the petitioner from other sources received annually, was the only issue for determination by the Board which adopted as its findings of fact, the stipulation hereinabove referred to, executed between the parties by their respective counsel.

[fol. 42] The sole contention of the petitioner is that the amounts in controversy are not taxable to her, but are taxable to her former husband who is still alive.

IV. Assignment of Errors

Your petitioner says and respectfully avers, that in the record and proceedings of the United States Board of Tax Appeals in the above-entitled cause, and in the final order entered therein, there is manifest error and for error petitioner respectfully assigns the following:

1. The Board erred in holding that there is a deficiency of tax for the calendar years 1935 and 1936 in the sums of $310.20 and $327.96 respectively or any other amount.

2. The Board erred in holding that the monthly payments received by the petitioner constitute taxable income to her.

3. The Board erred in failing to hold that the original instrument executed in the City of New York, dated December 6th 1913 was an agreement for her support and maintenance and at the time of its execution, was her husband's obligation, and that such obligation continued and was in existence at the time of the execution in the City of New York of the supplemental agreement on December 7th 1916.

4. The Board erred in failing to hold that subsequent to the divorce, the monthly payments continued to be taxable to the husband because they were in discharge of his existing contract obligations entered into on December 6th 1913 and December 7th 1916.

5. The Board erred in failing to hold that the annuity contract with the Travelers Insurance Company of Hart-

ford, Conn., was merely a substitute for the corpus of [fol. 43] the trust in accordance with the terms of both the original and supplemental contracts above referred to and was likewise in discharge of his existing contract obligations thereunder.

6. The Board erred in failing to hold that the investment in the said annuity made by William G. Pearce, the husband, was an investment of *his* and for *his* accommodation and to facilitate the discharge of *his* contract obligation, and in failing to hold that payments on the annuity contract made by the insurance company to petitioner were either return to the said husband of his capital, or if they exceeded the amount of principal paid, were income to him, which, in theory and in effect, he received and paid over to petitioner.

7. The Board erred in holding that there was clear and convincing proof that, under the laws of Texas, the agreement of the parties and the annuity contract gave the divorced husband a full discharge and left no continuing obligation however contingent upon him with respect to his wife.

8. The Board erred in holding that it has not been established in the present record upon clear and convincing proof and beyond mere inferences and vague conjectures that the husband was not completely discharged under the laws of Texas by the arrangement made with his wife.

9. The Board erred in failing to recognize the presumption, in the absence of statutory or interpretative court decisions to the contrary, that the obligation to support remains upon the husband.

10. The Board erred in failing to recognize that the law imposed a continuing obligation on the husband from which, even the wife was powerless to release him.

[fols. 44-45] Prayer

Wherefore, your petitioner prays for review by the United States Circuit Court of Appeals for the Second Circuit of the opinion, decision and order of the United States Board of Tax Appeals, in the above-entitled case, in accordance with the Act of Congress in such cases made and provided, and that the Clerk of said Board be directed to transmit and deliver to the Clerk of said Court certified copies of all and

every of the documents listed and set forth in the Rules adopted by the United States Circuit Court of Appeals for the Second Circuit providing for the presentation of petitions for review of decisions of the United States Board of Tax Appeals, and that this Honorable Court reverse said decision and grant petitioner such other and further relief as may be meet and proper in the premises.

And your petitioner will every pray.

(S.) Gordon S. P. Kleeberg, Counsel for Petitioner, 300 Madison Avenue, Borough of Manhattan, City of New York.

Duly sworn to by Gordon S. P. Kleeberg. Jurat omitted in printing.

[fol. 46] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 96,158

[Same Title]

PRAECIPE—Filed October 16, 1940

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, with reference to petition for review heretofore duly filed by the petitioner in the above cause on September 12, 1940, a transcript of the record on appeal in the above cause and include therein the following documents or certified copies thereof, to-wit:

(1) Docket entries of all proceedings before the United States Board of Tax Appeals.

(2) Pleadings before the said Board as follows:

(a) Petition for redetermination, including copy of deficiency letter attached thereto.

(b) Answer of respondent.

(3) Stipulation of Facts filed November 16, 1939 with Exhibits A to E inclusive attached thereto.

(4) Opinion of the Board of Tax Appeals promulgated June 14, 1940.

(5) Decision of the Board entered June 15, 1940.

(6) This Praecipe.

[fol. 47] The foregoing you will please prepare, certify and transmit as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

Dated, October 8, 1940.

(S.) Gordon S. P. Kleeberg, Attorney for Petitioner, 300 Madison Avenue, Manhattan, New York City.

Service of the foregoing praecipe and agreement thereto is hereby acknowledged.

(S.) J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

(S.) J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C., Attorney for Respondent.

[fol. 48] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 49] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1940

No. 155

(Argued April 10, 1941. Decided May 19, 1941)

JOSEPHINE S. PEARCE, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petition to review a decision of the Board of Tax Appeals redetermining a deficiency in the income taxes of the petitioner for 1935 and for 1936. Affirmed.

Before L. Hand, Augustus N. Hand and Chase, Circuit Judges

Gordon S. P. Kleeberg, Attorney for Petitioner; Gordon S. P. Kleeberg, Jacob Greenwald, of Counsel.

Samuel O. Clark, Jr., Assistant Attorney General; for Respondent.

Sewall Key, Michael H. Cardozo IV, Sp. Assistants to the Attorney General.

[fol. 50] CHASE, Circuit Judge:

The petitioner, a resident of the City of New York, is the divorced wife of William G. Pearce who is also a resident of New York City. In 1913, while they were still married but were not living together and were childless, the husband created a trust to provide for the separate support of his wife for life to the extent of payments to her of $350.00 monthly and to be in lieu of all her dower or other rights in any property owned by him or by them together and in discharge of all her claims upon him for support and maintenance. By a supplemental trust agreement made in 1916, the monthly payments were increased to $500.00 and the husband was given the option to terminate the trust and all the claims of the beneficiary wife upon it or upon him by purchasing and delivering to the wife an annuity contract under which one of several designated insurance companies agreed to pay to the wife the sum of $500.00 monthly during her life. Within a few days after the making of this supplemental agreement, the wife, who

had acquired a residence in Texas for that purpose, brought her petition in a Texas court for an absolute divorce. The husband entered his appearance in that action and in due course such a divorce was granted to the wife on Jan. 13, 1917. The decree was silent as to property rights; alimony or support and maintenance of any kind. There was no express retention of jurisdiction for such purposes.

Thereafter, and on May 1, 1917, the husband purchased and delivered to his former wife an annuity in one of the insurance companies mentioned in the supplemental agreement payable to her in the amount of $500.00 each month so long as she lived. He paid a lump sum for the annuity and was entitled to no return of premium or payment of any kind upon her death or at any other time. Payments have been made by the insurance company and received by [fol. 51] the wife regularly ever since in accordance with the terms of the annuity contract.

Neither the husband nor the wife included such payments made to her in the years 1935 and 1936 in their income tax returns. The Commissioner included such payments in the gross income of each for those years and notified each of the deficiency so created. Both appealed to the Board for a redetermination and the two appeals were heard together. The Commissioner conceded at the hearing before the Board that the deficiency determined in the income of the former husband was erroneous and insisted that that in the income of the former wife was correct. The Board redetermined the deficiencies in accord with the position of the Commissioner and the former wife brought this petition to review the redetermination of the deficiency in her income.

The petitioner bases her contention upon what is called the general rule that payments to a divorced wife which discharge a continuing obligation of her former husband to provide for her support are to be included in his taxable income. Douglas v. Willcuts, 269 U. S. 1. And further that the continuing obligation of the husband is to be treated as existing after the divorce decree because of the presumed power, until the contrary is clearly shown, of the divorce court to alter or amend the decree to charge the husband with the support of his former wife whether or not the decree as originally granted included provisions for alimony or property settlements. In support of this part of

the petitioner's argument reliance is put upon Helvering v. Fitch, 309 U. S. 149 and Helvering v. Leonard, 310 U. S. 80.

These principles are, of course, decisive where they are applicable and decision here must depend upon how they apply to a situation where the deficiency as redetermined has resulted not from an inclusion of payments made to the divorced wife in the gross income of the former husband but because they have been put into that of the divorced [fol. 52] wife who actually did receive them. The ordinary rule that gross income includes income "derived from any source whatever" (Sec. 22(a) of the Revenue Act of 1934) is also a general one and to be given effect unless an exception excludes it. Moreover, the determination of the Commissioner is presumptively correct and the burden to show error rests upon the petitioner. Welch v. Helvering, 290 U. S. 111; Wickwire v. Reinecke, 275 U. S. 101.

The Commissioner having determined the deficiency by including the payment in the gross income of the recipient and the Board having upheld the Commissioner, the petitioner now cannot relieve herself from the resulting taxation unless she can show that the decision under review was erroneous. Although she might show error by submitting clear and convincing proof that the payments she received did discharge a continuing obligation of her husband to provide for her support even after the decree of divorce so as to make the rule of Douglas v. Willcuts, supra, applicable in accordance with the decisions in Helvering v. Fitch and Helvering v. Leonard, both supra, she, being faced with the burden of overcoming an adverse decision of the Board, cannot prevail merely by showing that such an obligation upon the husband might have existed under Texas law. She was bound to show with such clarity that it did that the failure of the Board to recognize it and give it effect was error.

In this respect all that does appear, however, is doubt and uncertainty. There seems to be no statutory provision in Texas for decreeing alimony or support and maintenance as such to a divorced wife. Art. 4638 of Vol. 13 Vernon's Texas Civil Statutes provides, at the time a decree of divorce is pronounced, for "a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and

their children, if any." No case has been called to our attention and we have found none, where the Texas Supreme [fol. 53] Court has held that after a valid decree has become final there is any power to amend it by making new or altered provisions for the financial benefit of a divorced wife except in respect to community property. The nearest approach the petitioner has made to carrying her burden to show error is found in Cannon v. Cannon, 43 S. W. (2) 134 where the Court of Civil Appeals held there was no jurisdiction to grant the petition of a divorced wife to amend the decree in respect to division of property. An appeal to the Supreme Court of Texas was dismissed for want of jurisdiction. Cannon v. Cannon, 121 Tex. 634. Under the practice then prevailing such a decision could have meant either that the Supreme Court disagreed with the reasons given in support of the judgment below or held that it actually had no jurisdiction of the appeal. However, that may be, the matter is still so left at large that the petitioner has made no clear and convincing showing that the annuity payments received in either of the taxable years here involved came within the general rule set forth in Douglas v. Willcuts, supra, and so she has failed to show that the presumptively correct decision of the Board was erroneous.

Affirmed.

L. Hand, C. J., dissents with opinion.

L. Hand, C. J. (dissenting): We all agree that the law of Texas is uncertain as to whether the taxpayer's husband discharged himself of his marital liability by the settlement at bar. Therefore, if the taxpayer in order to escape had to show that the settlement did not discharge her husband, the Board was right; she did not do so. But the uncertainty of the law of Texas is obviously a separate issue from the actual law of Texas. Since she did show that it was un- [fol. 54] certain, she therefore succeeded if that was the only relevant issue. As I read Helvering v. Fitch, 309 U. S. 149, and Helvering v. Leonard, 310 U. S. 80, the husband is liable in these cases not only when the settlement does not discharge his marital liability, but when the law of his domicil leaves it uncertain whether the settlement has done so. For these reasons I think that the Board was wrong.

[fol. 55] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of June, one thousand nine hundred and forty-one.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

JOSEPHINE S. PEARCE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 56] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Josephine S. Pearce v. Commissioner of Int. Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 4, 1941. D. E. Roberts, Clerk.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 45,634, U. S. Circuit Court of Appeals, Second Circuit, Term No. 306. Josephine S. Pearce, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed July 24, 1941. Term No. 306 O. T. 1941.

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Supreme Court of the United States

October Term, 1941

No. 306

JOSEPHINE S. PEARCE

Petitioner

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Support Thereof

GORDON S. P. KLEEBERG
Attorney for Petitioner

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Supreme Court of the United States

October Term, 1941

No.

JOSEPHINE S. PEARCE,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above named Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above case on June 4, 1941, affirming the order of the United States Board of Tax Appeals which determined the presence of deficiencies in the 1935 and 1936 income tax returns of petitioner.

Statement

In the Circuit Court, two opinions were rendered, a majority opinion (per CHASE, C. J., concurred in by AUGUSTUS N. HAND, C. J.—pp. 49-52, Rec.) and a dissenting opinion per (L. HAND, C. J.—p. 52, Rec.).

The majority opinion contains an apt "summary and short statement of the matter involved". Except as indicated, we adopt it, interpolating therein (and in the remainder of this "Statement") appropriate parenthetical references to the folios of the Record. It reads as follows:

"The petitioner, a resident of the City of New York (38), is the divorced wife of William G. Pearce (38) who is also a resident of New York City (38). In 1913, while they were still married but were not living together and were childless (39, 42), the husband created a trust to provide for the separate support of his wife for life to the extent of payments to her of $350.00 monthly and to be in lieu of all her dower or other rights in any property owned by him or by them together and in discharge of all her claims upon him for support and maintenance (42, 54-78). By a supplemental trust agreement made in 1916, the monthly payments were increased to $500.00 and the husband was given the option to terminate the trust and all the claims of the beneficiary wife upon it or upon him by purchasing and delivering to the wife an annuity contract under which one of several designated insurance companies agreed to pay to the wife the sum of $500.00 monthly during her life (43, 81-91). Within a few days after the making of this supplemental agreement, the wife, who had acquired a residence in Texas" in 1914 (the majority opinion said, instead, "for that purpose") "brought her petition in a Texas court for an absolute divorce (39, 40). The husband entered his appearance in that action and in due course such a divorce was granted to the wife on Jan. 13, 1917 (40-2, 46-51). The decree was silent as to property rights; alimony or support and maintenance of any kind, (50-1). There was no express retention of jurisdiction for such purposes (50-1).

"Thereafter, and on May 1, 1917, the husband purchased and delivered to his former wife an annuity in

one of the insurance companies mentioned in the supplemental agreement payable to her in the amount of $500.00 each month so long as she lived (43-4, 95-7). He paid a lump sum for the annuity and was entitled to no return of premium or payment of any kind upon her death or at any other time (43, 95). Payments have been made by the insurance company and received by the wife regularly ever since in accordance with the terms of the annuity contract (44).

"Neither the husband nor the wife included such payments made to her in the years 1935 and 1936 in their income tax returns (102, 105). The Commissioner included such payments in the gross income of each for those years and notified each of the deficiency so created (102, 105). Both appealed to the Board for a redetermination and the two appeals were heard together (105-6). The Commissioner conceded at the hearing before the Board that the deficiency determined in the income of the former husband was erroneous and insisted that that in the income of the former wife was correct (105). The Board redetermined the deficiencies in accord with the position of the Commissioner (108) and the former wife brought * * * petition to review the redetermination of the deficiency in her income" (112-131).

The Board of Tax Appeals rendered an opinion (100-8) which was promulgated June 14, 1940 (100, 110) and entered its order on June 15th, 1940 (109-11).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered June 4, 1941 (p. 53, Rec.). The jurisdiction of THIS COURT is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A. Title 28, Section 347).

The Questions Presented

In *Douglas* v. *Willcuts* (296 U. S. 1) THIS COURT held that moneys paid to a wife from a trust fund established by her husband to provide support for the wife is his income and not hers for tax purposes. In *Helvering* v. *Fitch* (309 U. S. 149) and *Helvering* v. *Leonard* (310 U. S. 80), THIS COURT held that he who would avoid that general rule has "a distinct burden of establishing not by mere inference and conjecture, but by 'clear and convincing proof'" that local law and the provision made "have given the divorced husband a full discharge" leaving "no continuing obligation however contingent".

The questions presented are:

(1) Whether "the ordinary rule that gross income includes income 'derived from any source whatever' (Sec. 22(a) of the Revenue Act of 1934)" (quoted from the majority opinion below [p. 51, Rec.]), notwithstanding the *Douglas* rule, makes such moneys received by a wife her income, presumptively, so that the burden of showing the contrary is upon her.

(2) Whether the fact, that a determination of the Commissioner is presumptively correct (*Welch* v. *Helvering* [290 U. S. 111]; *Wickwire* v. *Reinecke* [275 U. S. 101]), places upon a taxpayer, seeking to avoid such a determination, the burden of showing, if that is her contention, that her set of facts, falls within the *Douglas* rule; or whether the rule of *Helvering* v. *Fitch* and *Helvering* v. *Leonard*, both *supra*, avoids that burden for her and places the burden upon the Commissioner (as it does upon a husband-taxpayer), if he would avoid the *Douglas* rule, to establish "not by mere inference and conjecture, but by 'clear and convincing proof' that local law and the alimony trust have given him (the husband) a full discharge."

(3) Whether the fact that the Commissioner has been upheld by the Board of Tax Appeals has any effect upon the resolution of the two problems presented in questions "1" and "2".

Reasons for Granting the Writ

1. The decision of the Circuit Court is in direct conflict with the decisions of THIS COURT in *Helvering* v. *Fitch* and *Helvering* v. *Leonard*, both *supra*. In both these cases, THIS COURT ruled that the one who "desires to avoid the general rule expressed in *Douglas* v. *Willcuts*, *supra*, * * * carries a distinct burden of establishing not by more inference and conjecture, but by 'clear and convincing proof' that local law and the alimony trust have given him (the husband) a full discharge" (p. 86 of the *Leonard* case).

In the instant case, the majority opinion has held that the burden was upon the wife, petitioner herein, who not only does not desire such avoidance but actually strives for the benefits of the *Douglas* rule (to show she was within the rule) and not upon him (the Commissioner) who, in fact, is the one who "desires to avoid the general rule".

2. The majority opinion of the Circuit Court has, by the manipulation of presumably conflicting presumptions nullified the effect of *Helvering* v. *Fitch* and *Helvering* v. *Leonard*, both *supra*, while indeed presuming to defer to the principle enunciated in both. Because the tax "deficiency as redetermined has resulted not from an inclusion of payments made to the divorced wife in the gross income of the former husband, but because they have been put into that of the divorced wife who actually did receive them" (p. 51, Rec.), the majority opinion held that the "ordinary rule that gross income includes income 'derived from any source whatever' (Section 22(a) of the Revenue

Act of 1934)" and the rule that "the determination of the Commissioner is presumptively correct * * * *Welch* v. *Helvering*, 290 U. S. 111; *Wickwire* v. *Reinecke*, 275 U. S. 101", overwhelm the *Douglas* rule and require of the petitioner that she show that her case is an exception to the rule of the cited section, and that she bear "the burden to show error" on the part of the Commissioner.

3. The dominance of the *Douglas* rule over the two rules invoked by the Circuit Court (reason "2", *supra*) or its inferiority to them is an important question of federal law which, so far as our research has revealed, has not been, but should be, settled by THIS COURT (unless, as we firmly believe, THIS COURT has already in *Helvering* v. *Fitch* and *Helvering* v. *Leonard*, both *supra*, settled the question in a manner contrary to the contentions of the majority opinion).

4. The dissenting opinion of L. HAND, *C. J.* (p. 52, Rec.), should be considered by THIS COURT and sustained for guidance in future similar situations.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

Dated, July 11th, 1941.

GORDON S. P. KLEEBERG,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION

(Figures in parentheses refer, when preceded by "p" or "pp", to the page or pages, otherwise to the folios, of the printed Transcript of Record)

Opinions Below

The opinion of the Board of Tax Appeals (100-108) is reported in 42 B. T. A. 91.

The opinions of the Circuit Court of Appeals (majority opinion, pp. 49-52; minority opinion, p. 52) are reported in 120 Fed. (2d) 228.

Statement

The relevant record facts and the facts with regard to the jurisdiction of THIS COURT are both stated in the petition.

Specification of Errors

The errors which petitioner will urge if the writ of certiorari is allowed are that the Circuit Court erred

(1) In holding that "the ordinary rule that gross income includes income 'derived from any source whatever' (Sec. 22(a) of the Revenue Act of 1934)" (quoted from the majority opinion [p. 51]), notwithstanding the *Douglas* rule (*Douglas* v. *Willcuts* [296 U. S. 1]), makes moneys received by a wife from an annuity established by her husband for her support, her income presumptively, so that the burden of showing the contrary is upon her.

(2) In holding that the fact, that a determination of the Commissioner is presumptively correct (*Welch* v. *Helvering* [290 U. S. 111]; *Wickwire* v. *Reinecke* [275 U. S.

101]), places upon a taxpayer, seeking to avoid such a determination, the burden of showing, if that is her contention, that her set of facts, falls within the *Douglas* rule; and that the rule of *Helvering* v. *Fitch* (309 U. S. 149) and *Helvering* v. *Leonard* (310 U. S. 80) does not avoid that burden for her and does not place the burden upon the Commissioner (as it does upon a husband-taxpayer), if he would avoid the *Douglas* rule, to establish "not by mere inference and conjecture, but by 'clear and convincing proof' that local law and the alimony trust have given him (the husband) a full discharge" (quoted from the *Leonard* case, p. 86).

(3) In holding that the fact that the Commissioner has been upheld by the Board of Tax Appeals fortifies the holdings, "1" and "2", *supra.*

Summary of Argument

The Commissioner had the "distinct burden of establishing not by mere inference and conjecture but by 'clear and convincing proof' that local law and the alimony trust (the annuity plan herein) have given him (the husband) a full discharge" but he failed to carry that burden. Petitioner had no burden to show the contrary.

The income herein was petitioner's husband's, not hers.

Argument

Douglas v. *Willcuts,* 296 U. S. 1, is the leading authority on the taxability of so-called "alimony trusts" and holds that

> "the net income of the trust fund which was paid to the wife * * *, stands substantially on the same footing as though he [husband] had received the income personally and had been required by the decree to make the payment directly."

It is respectfully submitted that although the opinion in that case was, of necessity, couched in terms of "trust", the principle there laid down is not restricted to that particular method of satisfying an obligation. *Douglas* v. *Willcuts* (*supra*, at p. 9), we respectfully submit, stands for the proposition

> "that income was received by a taxpayer, when, pursuant to a contract, a debt or other obligation was discharged by another for his benefit. The transaction was regarded as being the same in substance as if the money had been paid to the taxpayer and he had transmitted it to his creditor."

In the case at bar, it is to be noted that by the original trust agreement (54-80) and by the supplemental agreement (81-94) the monthly payments to petitioner were in discharge of all claims including that for alimony, support and maintenance which petitioner might have against her former husband.

The annuity is nothing more than a substitution of one form of security for another, the corpus of the trust. Regardless of the method employed, it is still but a plan whereby petitioner received moneys in satisfaction of all claims she might have against her husband for support. Whether the moneys are paid to petitioner by a trustee under a trust agreement, or by an insurance company under an annuity provision, the transaction is still to be regarded as being the same in substance as if the money were being paid to the husband in the first instance and transmitted by him to his wife.

And by virtue of the rule enunciated in *Douglas* v. *Willcuts*, *supra*, the money received is to be regarded as the husband's income taxable to him, and to him alone.

In *Helvering* v. *Fitch* (309 U. S. 149) THIS COURT (at p. 151) again expressed this same thought conceiving the

amounts paid to a wife "as paid in discharge of the general obligation to support" which the husband has.

The entire tenor of the *Fitch* case is to the effect that there is a presumption that a husband, upon divorce, continues liable to support his wife and will be taxed on moneys received by the wife from a trust created by him to provide the wife with such support, unless there is clear and convincing proof that the husband received a discharge under local law.

The *Fitch* case and the authorities following it clearly indicate that not only the trust instrument but also local law must give the husband a discharge to overcome such presumption.

As was stated in the *Fitch* case, *supra*, at page 156 (*italics ours*):

> "Enough has been said to show that respondent has not sustained the burden of establishing that his case falls outside the general rule expressed in Douglas *v.* Willcuts, *supra*. If we were to conclude that this case is an exception to that rule we would be acting largely on conjecture as to Iowa law. * * * That we cannot do. *For if such a result is to obtain, it must be bottomed on clear and convincing proof, and not on mere inferences and vague conjectures, that local law and the alimony trust have given the divorced husband a full discharge and leave no continuing obligation however contingent. Only in that event can income to the wife from an alimony trust be treated under the revenue acts the same as income accruing from property after a debtor has transferred that property to his creditor in full satisfaction of his obligation—unless of course Congress decides otherwise.*"

The presumption of continuing obligation to support may have been recognized in the decision of the Circuit Court (and in that of the Board of Tax Appeals) but in a manner that gives only lip service to the presumption.

Said the Circuit Court majority opinion (p. 51):

"These principles (i. e. the principles above expounded) are, of course, decisive where they are applicable and decision here must depend upon how they apply to a situation where the deficiency as redetermined has resulted not from an inclusion of payments made to the divorced wife in the gross income of the former husband but because they have been put into that of the divorced wife who actually did receive them. The ordinary rule that gross income includes income 'derived from any source whatever' (Sec. 22(a) of the Revenue Act of 1934) is also a general one and to be given effect unless an exception excludes it. Moreover, the determination of the Commissioner is presumptively correct and the burden to show error rests upon the petitioner. Welch *v.* Helvering, 290 U. S. 111; Wickwire *v.* Reinecke, 275 U. S. 101.

"The Commissioner having determined the deficiency by including the payment in the gross income of the recipient and the Board having upheld the Commissioner, the petitioner now cannot relieve herself from the resulting taxation unless she can show that the decision under review was erroneous. Although she might show error by submitting clear and convincing proof that the payments she received did discharge a continuing obligation of her husband to provide for her support even after the decree of divorce so as to make the rule of Douglas *v.* Willcuts, *supra,* applicable in accordance with the decisions in Helvering *v.* Fitch and Helvering *v.* Leonard, both *supra,* she, being faced with the burden of overcoming an adverse decision of the Board, cannot prevail merely by showing that such an obligation upon the husband might have existed under Texas law. She was bound to show with such clarity that it did that the failure of the Board to recognize it and give it effect was error."

In other words, as we read the above excerpt, it was the opinion of the majority of the Circuit Court that it is a petitioner as such, who seeks to be relieved of a de-

ficiency sought to be imposed upon her, who has the burden of proving, by "clear and convincing proof", the effect of "local law and the alimony trust" upon the "continuing obligation however contingent" of the divorced husband. It is not to be the one who desires to show "that his case falls outside the general rule expressed in *Douglas* v. *Willcuts, supra*", who has the burden of establishing that it does.

If, as is the fact is this case, it is the wife who seeks to escape taxation, then she must establish that her case falls (not "outside" but) *within* that general rule.

From all this, something of an absurdity must result. For example in the instant situation, the husband was also a petitioner (105-6; see also statement of facts in majority opinion, p. 50). If the husband, as petitioner, failed in his proof and the wife, as petitioner, in hers, who is to pay the tax? Both, if the Circuit Court majority opinion is right.

Actually of course, the absurdity never eventuates, because the principle involved is a substantive matter. The law presumes continuing liability of a husband to support his wife, of a father to support his child, and one who would rebut that salutary presumption, be he petitioner or respondent, husband or wife—has the burden to do so.

This is plainly the intent, the point of departure, of the *Fitch* case, as a reading of the whole opinion plainly indicates.

Accordingly, in the instant situation, if the husband, as petitioner, would claim rights based on release it was his burden and if the Commissioner, as respondent, would claim rights based on release, it was his burden also. Virtually, if not in form, wife and husband oppose each other here and he and not she must rebut the presumption.

In *Helvering* v. *Leonard*, 310 U. S. 80, the Court at page 86, commenting on the principle of presumption and burden of proof in the *Fitch* case said:

> "In Helvering *v.* Fitch, *supra*, we stated that where the divorced husband desires to avoid the general rule expressed in Douglas *v.* Willcuts, *supra*, he carries a distinct burden of establishing not by mere inference and conjecture but by 'clear and convincing proof' that local law and the alimony trust have given him a full discharge."

Since petitioner does not desire "to avoid the general rule", she does not carry the burden. Since respondent does desire "to avoid the general rule", he does carry that burden.

Welch v. *Helvering* (290 U. S. 111) and *Wickwire* v. *Reinecke* (275 U. S. 101), cited in our above excerpt from the majority opinion, establish no more than a practical rule of procedure in proof-giving applicable generally in these tax controversies.

To be sure, generally, "the decision of the Commissioner of Internal Revenue • • • furnished *prima facie* evidence of its correctness" (*Wickwire* v. *Reinecke, supra*). It is evident good sense that the burden of going forward should fall upon the taxpayer. But having said that, we have said no more than what is usually said when it is stated that a plaintiff has the burden of proof in any action.

How does a plaintiff in any action meet his burden of proof? Obviously, by proof or, when circumstances so indicate, by the expedient of presumptions.

In the instant case, petitioner has not shunned her burden of proof within the meaning of the *Welch* and *Wickwire* cases. By no means. But in carrying her burden, she has resorted to a presumption, to-wit: "the general rule expressed in *Douglas* v. *Willcuts*" (quoted from *Helvering* v. *Fitch, supra*). And that general rule, as was stated in said *Fitch* case "is clear. Amounts paid to a divorced wife • • • are not regarded as income of the wife, but as paid in discharge of the general obligation to support • • •."

Having resorted to "the general rule", petitioner has met the requirements of the *Welch* and *Wickwire* cases, that she show that the ruling of the Commissioner of Internal Revenue is wrong. Who "desires to avoid the general rule" (quoted from *Helvering* v. *Leonard*, 310 U. S. 80, 86)? Certainly not petitioner.

And as we have pointed out, if respondent would "avoid the general rule", it is his burden to do so.

The dissenting opinion of the Circuit Court said (p. 52):

> "As I read Helvering *v.* Fitch, 309 U. S. 149, and Helvering *v.* Leonard, 310 U. S. 80, the husband is liable in these cases not only when the settlement does not discharge his marital liability, but when the law of his domicil leaves it uncertain whether the settlement has done so."

We go even further than this, and say that even if the record were entirely silent as to the effect of local law or as to whether the local law is uncertain, the general rule of *Douglas* v. *Willcuts, supra,* controls.

This brings us to the implication of the majority opinion that somehow "the ordinary rule that gross income includes income 'derived from any source whatever'" affects this situation. We ask: how can it? Didn't that rule exist when *Douglas* v. *Willcutts* was decided? Doesn't it exist always? If it is to give us pause, then what meaning shall be attached to the *Douglas* rule?

If all receipts whatever are to be presumed income, then we certainly cannot indulge the presumption (of the *Douglas* case) that income received by a wife from her husband or his devices is not her income.

Again, we ask, what significance can be attached (as the majority opinion has done [p. 51]) to the fact that the Board of Tax Appeals has upheld the Commissioner?

What was reviewed by the Circuit Court is precisely the propriety of that upholding. One cannot justify a result by assuming the accuracy of that result in one's syllogism.

Could a showing of release of petitioner's husband under Texas law be made, by the "clear and convincing proof", the *Fitch* case called for?

The dissenting opinion of the Circuit Court says (p. 52):

> "We all agree that the law of Texas is uncertain as to whether the taxpayer's husband discharged himself of his marital liability by the settlement at bar."

The majority opinion says (p. 51):

> "In this respect all that does appear, however, is doubt and uncertainty."

The Texas statute, *eo nomine*, does not provide for alimony (excepting *pendente lite*), but, by way of permanent care of a divorced wife, the Texas courts can, after the decree of divorce,

(a) Award a divorced wife the equivalent of alimony, by directing the divorced husband to pay her weekly, monthly or annual payments for life.

Johnson v. *Johnson*, 14 S. W. (2) 805, requiring periodical payments, after divorce for wife's support; *Levy* v. *Goldsoll*, 131 S. W. 420; *Berg* v. *Berg*, 115 S. W. (2) 1171, awarding divorced wife $17.50 a month out of husband's railroad pension of $59.50 per month; *Keton* v. *Clark*, 67 S. W. (2) 437; *Scannell* v. *Scannell*, 117 S. W. (2) 538; *Daniel* v. *Daniel*, 30 S. W. (2) 801; *Wiley* v. *Wiley*, 33 Tex. 358, awarding the wife annually for life or until remarriage $100 annually; *Clark* v. *Clark*, 35 S. W. (2) 189, awarding the wife $25.00 a month.

(b) Order the division of community property between the divorced couple.

Article 4638, *Texas Revised Civil Statutes; Askew* v. *Rountree*, 120 S. W. (2) 117; *Berg* v. *Berg, supra.*

(c) Direct division between them of their separate estate (individually owned personal property) and establish a trust on the rents and income from separately owned real property.

Ex parte Scott, 123 S. W. (2) 306; *Blair* v. *Blair*, 105 S. W. (2) 331; *Hedtke* v. *Hedtke*, 112 Tex. 404, 248 S. W. 21; *Berg* v. *Berg, supra; Keton* v. *Clark, supra; Clark* v. *Clark, supra.*

(d) Combine several of the foregoing methods.

Helm v. *Helm*, 291 S. W. 648; *Ex Parte Scott, supra; Berg* v. *Berg, supra;* 15 *Texas Jurisprudence*, p. 587, Sec. 110 and

(e) apparently hold jurisdiction to alter the final decree of divorce, in any respect at any time.

Cannon v. *Cannon* (121 Tex. 634), a decision of the Supreme Court of Texas on an appeal from a decision of the Court of Civil Appeals reported in 43 S. W. (2) 134.

In Chapter 3, Title 37, Article 1728 of the *Texas Revised Civil Statutes*, which defines the jurisdiction of the Supreme Court of Texas, there appears the following (*italics ours*):

> "In all cases where the judgment of the Court of Civil Appeals is a correct one, and where the principles of law declared in the opinion of the Court are correctly determined, the Supreme Court shall *refuse the application;* in all cases where the judgment of the Court of Civil Appeals is a correct one, but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall *dismiss the case for want of jurisdiction.*"

In other words, if both result and reasoning are correct, the Supreme Court *refuses the application.* If the result is correct, but the reasoning of the opinion below appears wrong to the Supreme Court—in other words, the law has not been correctly stated by the lower court, then the Supreme Court *dismisses the case* because the result, *i. e.*, the judgment of the lower court would remain unchanged.

In said *Cannon* case, in the District Court, "Appellee was granted a divorce from appellant, and obtained a judgment against him for certain property real estate, notes * * *" (quoted from the opinion of the Court of Civil Appeals). It will be noted that this was a property settlement, as was the annuity in the instant case. After the judgment and upon the application of the wife, "The original judgment was so corrected as to give appellee a one-half interest in corporate stock and shares" (also quoted from the opinion of the Court of Civil Appeals).

The Court of Civil Appeals in considering this addition to the original judgment, disapproved of it and said:

> "To hold that judgment can be added to at any subsequent term in the absence of fraud or mistake would destroy the finality of any judgment and produce a chaotic condition in the acts of any court. If property can be added to an inventory in any case after the term has ended, it could be pursued indefinitely."

On appeal to the Texas Supreme Court, the case was "Dismissed for want of jurisdiction, April 6, 1932" (121 Tex. 634).

The majority opinion below said with regard to this (p. 52):

> "Under the practice then prevailing such a decision could have meant either that the Supreme Court disagreed with the reasons given in support of the judgment below or held that it actually had no jurisdiction of the appeal."

Actually, in view of the plain language of Art. 1728, *supra*, the decision meant that the Supreme Court had no jurisdiction of the appeal because it found "the judgment • • • a correct one, but • • • not • • • that the opinion • • • correctly declared the law".

In the Circuit Court, even respondent cited two instances (*Gray* v. *Thomas*, 83 Tex. 246, 18 S. W. 721; *Whetstone* v. *Coffey*, 48 Tex. 269) where "a wife was permitted to assert rights in community property which had not been divided at the time of the divorce" (quoted from respondent's brief in the Circuit Court).

In view of the foregoing, it is respectfully submitted (a) that petitioner had no duty to show that her husband was not released from his natural obligation to support her; (b) that respondent had the duty to show release and has not done so; (c) that Texas law provides continuing liability in petitioner's husband; and, (d) in any event, that the presumption of continuing liability must lead to a holding that petitioner's husband, and not petitioner, is taxable on the annuity payments received by petitioner in lieu of support and maintenance.

CONCLUSION

For the reasons heretofore assigned, it is respectfully submitted that the case is one which justifies the issuance of a writ of certiorari.

Respectfully submitted,

GORDON S. P. KLEEBERG,
Attorney for Petitioner.

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Supreme Court of the United States

October Term, 1941

No. 306

JOSEPHINE S. PEARCE

Petitioner

against

COMMISSIONER OF INTERNAL REVENUE

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

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Supreme Court of the United States

October Term, 1941

No. 306

JOSEPHINE S. PEARCE,

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against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

(Figures in parentheses refer to the pages of the printed Transcript of Record)

Petitioner herein, the above-named Josephine S. Pearce, presents for review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above case on June 4, 1941 (37), affirming the order of the United States Board of Tax Appeals (26) which determined the presence of deficiencies in her 1935 and 1936 income tax returns.

Opinions Below

The opinion in the Board of Tax Appeals (24-5) is reported in 42 B. T. A. 91.

The opinions in the Circuit Court of Appeals (majority opinion, 33-6; dissenting opinion, 36) are reported in 120 Fed. (2d) 228.

Statement of Jurisdiction

The judgment of the Circuit Court of Appeals was entered June 4, 1941 (37). The jurisdiction of THIS COURT was invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A. Title 28, Section 347). Certiorari was granted by THIS COURT on October 13, 1941 on petitioner's petition therefor, filed July 24, 1941 (39).

Statement of Case

The aforementioned majority opinion in the Circuit Court contains an apt "concise statement of the case." Except as indicated, we adopt it, interpolating therein appropriate parenthetical page references to the Record. It reads as follows:

"The petitioner, a resident of the City of New York (8), is the divorced wife of William G. Pearce (9) who is also a resident of New York City (8). In 1913, while they were still married but were not living together and were childless (9), the husband created a trust to provide for the separate support of his wife for life to the extent of payments to her of $350.00 monthly and to be in lieu of all her dower or other rights in any property owned by him or by them together and in discharge of all her claims upon him for support and maintenance (9-10; 12-18). By a supplemental trust agreement made in 1916, the monthly payments were increased to $500.00 and the husband was given the option to terminate the trust and all the claims of the beneficiary wife upon it or upon him by purchasing and delivering to the wife an annuity contract under which one of several designated insurance companies agreed to pay to the wife the sum of $500.00 monthly during her life (10, 19-22). Within a few days after the making of this

supplemental agreement, the wife, who had acquired a residence in Texas" in 1914 (the majority opinion said, instead, "for that purpose") "brought her petition in a Texas court for an absolute divorce (9). The husband entered his appearance in that action and in due course such a divorce was granted to the wife on Jan. 13, 1917 (9, 10-12). The decree was silent as to property rights; alimony or support and maintenance of any kind (11). There was no express retention of jurisdiction for such purposes (11).

"Thereafter, and on May 1, 1917, the husband purchased and delivered to his former wife an annuity in one of the insurance companies mentioned in the supplemental agreement payable to her in the amount of $500.00 each month so long as she lived (10, 22-3). He paid a lump sum for the annuity and was entitled to no return of premium or payment of any kind upon her death or at any other time (10, 22). Payments have been made by the insurance company and received by the wife regularly ever since in accordance with the terms of the annuity contract (10).

"Neither the husband nor the wife included such payments made to her in the years 1935 and 1936 in their income tax returns (24, 25). The Commissioner included such payments in the gross income of each for those years and notified each of the deficiency so created (24, 25). Both appealed to the Board for a redetermination and the two appeals were heard together (25). The Commissioner conceded at the hearing before the Board that the deficiency determined in the income of the former husband was erroneous and insisted that that in the income of the former wife was correct (25). The Board redetermined the deficiencies in accord with the position of the Commissioner (25) and the former wife brought * * * petition to review the redetermination of the deficiency in her income" (26-31).

Specification of Errors

Petitioner urges that the Circuit Court erred

(1) In holding that "the ordinary rule that gross income includes income 'derived from any source whatever' (Sec. 22(a) of the Revenue Act of 1934)" (quoted from the majority opinion [35]), notwithstanding the *Douglas* rule (*Douglas* v. *Willcuts* [296 U. S. 1]), makes moneys received by a wife from an annuity established by her husband for her support, her income presumptively, so that the burden of showing the contrary is upon her.

(2) In holding that the fact, that a determination of the Commissioner is presumptively correct (*Welch* v. *Helvering* [290 U. S. 111]; *Wickwire* v. *Reinecke* [275 U. S. 101]), places upon a taxpayer, seeking to avoid such a determination, the burden of showing, if that is her contention, that her set of facts, falls within the *Douglas* rule; and that the rule of *Helvering* v. *Fitch* (309 U. S. 149) and *Helvering* v. *Leonard* (310 U. S. 80) does not avoid that burden for her and does not place the burden upon the Commissioner (as it does upon a husband-taxpayer), if he would avoid the *Douglas* rule, to establish "not by mere inference and conjecture, but by 'clear and convincing proof' that local law and the alimony trust have given him (the husband) a full discharge" (quoted from the *Leonard* case, p. 86).

(3) In holding that the fact that the Commissioner has been upheld by the Board of Tax Appeals fortifies the holdings, "1" and "2," *supra*.

Summary of Argument

The Commissioner had the "distinct burden of establishing not by mere inference and conjecture but by 'clear and convincing proof' that local law and the alimony trust (the annuity plan herein) have given him (the husband) a full discharge" but he failed to carry that burden. Petitioner had no burden to show the contrary.

The income herein was petitioner's husband's, not hers.

Argument

Douglas v. *Willcuts*, 296 U. S. 1, is the leading authority on the taxability of so-called "alimony trusts" and holds that

> "the net income of the trust fund which was paid to the wife • • • stands substantially on the same footing as though he [husband] had received the income personally and had been required by the decree to make the payment directly."

It is respectfully submitted that although the opinion in that case was, of necessity, couched in terms of "trust," the principle there laid down is not restricted to that particular method of satisfying an obligation. *Douglas* v. *Willcuts, supra* (at p. 9), we respectfully submit, stands for the proposition

> "that income was received by a taxpayer, when, pursuant to a contract, a debt or other obligation was discharged by another for his benefit. The transaction was regarded as being the same in substance as if the money had been paid to the taxpayer and he had transmitted it to his creditor."

In the case at bar, it is to be noted that by the original trust agreement (12-19) and by the supplemental agree-

ment (19-22) the monthly payments to petitioner were in discharge of all claims including that for alimony, support and maintenance which petitioner might have against her former husband.

The annuity is nothing more than a substitution of one form of security for another, the corpus of the trust. Regardless of the method employed, it is still but a plan whereby petitioner received moneys in satisfaction of all claims she might have against her husband for support. Whether the moneys are paid to petitioner by a trustee under a trust agreement, or by an insurance company under an annuity provision, the transaction is still to be regarded as being the same in substance as if the money were being paid to the husband in the first instance and transmitted by him to his wife.

And by virtue of the rule enunciated in *Douglas* v. *Willcuts, supra,* the money received is to be regarded as the husband's income taxable to him, and to him alone.

In *Helvering* v. *Fitch* (309 U. S. 149) THIS COURT (at p. 151) again expressed this same thought conceiving the amounts paid to a wife "as paid in discharge of the general obligation to support" which the husband has.

The entire tenor of the *Fitch* case is to the effect that there is a presumption that a husband, upon divorce, continues liable to support his wife and will be taxed on moneys received by the wife from a trust created by him to provide the wife with such support, unless there is clear and convincing proof that the husband received a discharge under local law.

The *Fitch* case and the authorities following it clearly indicate that not only the trust instrument but also local law must give the husband a discharge to overcome such presumption.

As was stated in the *Fitch* case, *supra,* at page 156 (*italics ours*):

> "Enough has been sa to show that respondent has not sustained the burden of establishing that his

case falls outside the general rule expressed in Douglas *v.* Willcuts, *supra.* If we were to conclude that this case is an exception to that rule we would be acting largely on conjecture as to Iowa law. * * * That we cannot do. *For if such a result is to obtain, it must be bottomed on clear and convincing proof, and not on mere inferences and vague conjectures, that local law and the alimony trust have given the divorced husband a full discharge and leave no continuing obligation however contingent. Only in that event can income to the wife from an alimony trust be treated under the revenue acts the same as income accruing from property after a debtor has transferred that property to his creditor in full satisfaction of his obligation—unless of course Congress decides otherwise.*"

The presumption of continuing obligation to support may have been recognized in the decision of the Circuit Court (and in that of the Board of Tax Appeals) but in a manner that gives only lip service to the presumption. Said the Circuit Court majority opinion (35):

"These principles (*i. e.*, the principles above expounded) are, of course, decisive where they are applicable and decision here must depend upon how they apply to a situation where the deficiency as redetermined has resulted not from an inclusion of payments made to the divorced wife in the gross income of the former husband but because they have been put into that of the divorced wife who actually did receive them. The ordinary rule that gross income includes income 'derived from any source whatever' (Sec. 22(a) of the Revenue Act of 1934) is also a general one and to be given effect unless an exception excludes it. Moreover, the determination of the Commissioner is presumptively correct and the burden to show error rests upon the petitioner. Welch *v.* Helvering, 290 U. S. 111; Wickwire *v.* Reinecke, 275 U. S. 101.

"The Commissioner having determined the deficiency by including the payment in the gross income

of the recipient and the Board having upheld the Commissioner, the petitioner now cannot relieve herself from the resulting taxation unless she can show that the decision under review was erroneous. Although she might show error by submitting clear and convincing proof that the payments she received did discharge a continuing obligation of her husband to provide for her support even after the decree of divorce so as to make the rule of Douglas *v.* Willcuts, *supra,* applicable in accordance with the decisions in Helvering v. Fitch and Helvering *v.* Leonard, both *supra,* she, being faced with the burden of overcoming an adverse decision of the Board, cannot prevail merely by showing that such an obligation upon the husband might have existed under Texas law. She was bound to show with such clarity that it did that the failure of the Board to recognize it and give it effect was error."

In other words, as we read the above excerpt, it was the opinion of the majority of the Circuit Court that it is a petitioner as such, who seeks to be relieved of a deficiency sought to be imposed upon her, who has the burden of proving, by "clear and convincing proof," the effect of "local law and the alimony trust" upon the "continuing obligation however contingent" of the divorced husband. It is not to be the one who desires to show "that his case falls outside the general rule expressed in *Douglas* v. *Willcuts, supra,*" who has the burden of establishing that it does.

If, as is the fact in this case, it is the wife who seeks to escape taxation, then she must establish that her case falls (not "outside" but) *within* that general rule.

From all this, something of an absurdity must result. For example in the instant situation, the husband was also a petitioner (25, 34). If the husband, as petitioner, failed in his proof and the wife, as petitioner, in hers, who is to pay the tax? Both, if the Circuit Court majority opinion is right.

Actually, of course, the absurdity never eventuates, because the principle involved is a substantive matter. The law presumes continuing liability of a husband to support his wife, of a father to support his child, and one who would rebut that salutary presumption, be he petitioner or respondent, husband or wife—has the burden to do so.

This is plainly the intent, the point of departure, of the *Fitch* case, as a reading of the whole opinion plainly indicates.

Accordingly, in the instant situation, if the husband, as petitioner, would claim rights based on release it was his burden and if the Commissioner, as respondent, would claim rights based on release, it was his burden also. Virtually, if not in form, wife and husband oppose each other here and he and not she must rebut the presumption.

In *Helvering* v. *Leonard*, 310 U. S. 80, the Court at page 86, commenting on the principle of presumption and burden of proof in the *Fitch* case said:

> "In Helvering *v.* Fitch, *supra*, we stated that where the divorced husband desires to avoid the general rule expressed in Douglas *v.* Willcuts, *supra*, he carries a distinct burden of establishing not by mere inference and conjecture but by 'clear and convincing proof' that local law and the alimony trust have given him a full discharge."

Since petitioner does not desire "to avoid the general rule," she does not carry the burden. Since respondent does desire "to avoid the general rule," he does carry that burden.

Welch v. *Helvering* (290 U. S. 111) and *Wickwire* v. *Reinecke* (275 U. S. 101), cited in our above excerpt from the majority opinion, establish no more than a practical rule of procedure in proof-giving applicable generally in these tax controversies.

To be sure, generally, "the decision of the Commissioner of Internal Revenue * * * furnished *prima facie*

evidence of its correctness" (*Wickwire* v. *Reinecke, supra*). It is evident good sense that the burden of going forward should fall upon the taxpayer. But having said that, we have said no more than what is usually said when it is stated that a plaintiff has the burden of proof in any action.

How does a plaintiff in any action meet his burden of proof? Obviously, by proof or, when circumstances so indicate, by the expedient of presumptions.

In the instant case, petitioner has not shunned her burden of proof within the meaning of the *Welch* and *Wickwire* cases. By no means. But in carrying her burden, she has resorted to a presumption, to-wit: "the general rule expressed in *Douglas* v. *Willcuts*" (quoted from *Helvering* v. *Fitch, supra*). And that general rule, as was stated in said *Fitch* case "is clear. Amounts paid to a divorced wife * * * are not regarded as income of the wife, but as paid in discharge of the general obligation to support * * *."

Having resorted to "the general rule," petitioner has met the requirements of the *Welch* and *Wickwire* cases, that she show that the ruling of the Commissioner of Internal Revenue is wrong. Who "desires to avoid the general rule" (quoted from *Helvering* v. *Leonard*, 310 U. S. 80, 86)? Certainly not petitioner.

And as we have pointed out, if respondent would "avoid the general rule," it is his burden to do so.

The dissenting opinion of the Circuit Court said (36):

> "As I read Helvering *v.* Fitch, 309 U. S. 149, and Helvering *v.* Leonard, 310 U. S. 80, the husband is liable in these cases not only when the settlement does not discharge his marital liability, but when the law of his domicil leaves it uncertain whether the settlement has done so."

We go even further than this, and say that even if the record were entirely silent as to the effect of local law or

as to whether the local law is uncertain, the general rule of *Douglas* v. *Willcuts, supra,* controls.

This brings us to the implication of the majority opinion that somehow "the ordinary rule that gross income includes income 'derived from any source whatever'" affects this situation. We ask: how can it? Didn't that rule exist when *Douglas* v. *Willcuts* was decided? Doesn't it exist always? If it is to give us pause, then what meaning shall be attached to the *Douglas* rule?

If all receipts whatever are to be presumed income, then we certainly cannot indulge the presumption (of the *Douglas* case) that income received by a wife from her husband or his devices is not her income.

Again, we ask, what significance can be attached (as the majority opinion has [35]) to the fact that the Board of Tax Appeals has upheld the Commissioner? What was reviewed by the Circuit Court is precisely the propriety of that upholding. One cannot justify a result by assuming the accuracy of that result in one's syllogism.

Could a showing of release of petitioner's husband under Texas law be made, by the "clear and convincing proof," the *Fitch* case called for?

The dissenting opinion of the Circuit Court says (36):

> "We all agree that the law of Texas is uncertain as to whether the taxpayer's husband discharged himself of his marital liability by the settlement at bar."

The majority opinion says (35):

> "In this respect all that does appear, however, is doubt and uncertainty."

The Texas statute, *eo nomine,* does not provide for alimony (excepting *pendente lite*), but, by way of permanent care of a divorced wife, the Texas courts can, after the decree of divorce,

(a) Award a divorced wife the equivalent of alimony, by directing the divorced husband to pay her weekly, monthly or annual payments for life.

Johnson v. *Johnson,* 14 S. W. (2d) 805, requiring periodical payments, after divorce for wife's support; *Levy* v. *Goldsoll,* 131 S. W. 420; *Berg* v. *Berg,* 115 S. W. (2) 1171, awarding divorced wife $17.50 a month out of husband's railroad pension of $59.50 per month; *Keton* v. *Clark,* 67 S. W. (2) 437; *Scannell* v. *Scannell,* 117 S. W. (2) 538; *Daniel* v. *Daniel,* 30 S. W. (2) 801; *Wiley* v. *Wiley,* 33 Tex. 358, awarding the wife annually for life or until remarriage $100 annually; *Clark* v. *Clark,* 35 S. W. (2) 189, awarding the wife $25.00 a month.

(b) Order the division of community property between the divorced couple.

Article 4638, *Texas Revised Civil Statutes; Askew* v. *Rountree,* 120 S. W. (2) 117; *Berg* v. *Berg, supra.*

(c) Direct division between them of their separate estate (individually owned personal property) and establish a trust on the rents and income from separately owned real property.

Ex parte Scott, 123 S. W. (2) 306; *Blair* v. *Blair,* 105 S. W. (2) 331; *Hedtke* v. *Hedtke,* 112 Tex. 404, 248 S. W. 21; *Berg* v. *Berg, supra; Keton* v. *Clark, supra; Clark* v. *Clark, supra.*

(d) Combine several of the foregoing methods.

Helm v. *Helm,* 291 S. W. 648; *Ex Parte Scott, supra; Berg* v. *Berg, supra;* 15 *Texas Jurisprudence,* p. 587, Sec. 110 and

(e) Apparently hold jurisdiction to alter the final decree of divorce, in any respect at any time.

Cannon v. *Cannon* (121 Tex. 634), a decision of the Supreme Court of Texas on an appeal from a decision of the Court of Civil Appeals reported in 43 S. W. (2) 134.

In Chapter 3, Title 37, Article 1728 of the *Texas Revised Civil Statutes*, which defines the jurisdiction of the Supreme Court of Texas, there appears the following (*italics ours*):

> "In all cases where the judgment of the Court of Civil Appeals is a correct one, and where the principles of law declared in the opinion of the Court are correctly determined, the Supreme Court shall *refuse the application;* in all cases where the judgment of the Court of Civil Appeals is a correct one, but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall *dismiss the case for want of jurisdiction.*"

In other words, if both result and reasoning are correct, the Supreme Court *refuses the application.* If the result is correct, but the reasoning of the opinion below appears wrong to the Supreme Court—in other words, the law has not been correctly stated by the lower court, then the Supreme Court *dismisses the case* because the result, *i. e.*, the judgment of the lower court would remain unchanged.

In said *Cannon* case, in the District Court, "Appellee was granted a divorce from appellant, and obtained a judgment against him for certain property, real estate, notes * * *" (quoted from the opinion of the Court of Civil Appeals). It will be noted that this was a property settlement, as was the annuity in the instant case. After the judgment and upon the application of the wife, "The original judgment was so corrected as to give appellee a one-half interest in corporate stock and shares" (also quoted from the opinion of the Court of Civil Appeals).

The Court of Civil Appeals in considering this addition to the original judgment, disapproved of it and said:

> "To hold that judgment can be added to at any subsequent term in the absence of fraud or mistake would destroy the finality of any judgment and produce a chaotic condition in the acts of any court. If property can be added to an inventory in any case after the term has ended, it could be pursued indefinitely."

On appeal to the Texas Supreme Court, the case was "Dismissed for want of jurisdiction, April 6, 1932" (121 Tex. 634).

The majority opinion below said with regard to this (36):

> "Under the practice then prevailing such a decision could have meant either that the Supreme Court disagreed with the reasons given in support of the judgment below or held that it actually had no jurisdiction of the appeal."

Actually, in view of the plain language of Art. 1728, *supra*, the decision meant that the Supreme Court had no jurisdiction of the appeal because it found "the judgment • • • a correct one, but • • • not • • • that the opinion • • • correctly declared the law."

In the Circuit Court, even respondent cited two instances (*Gray* v. *Thomas*, 83 Tex. 246, 18 S. W. 721; *Whetstone* v. *Coffey*, 48 Tex. 269) where "a wife was permitted to assert rights in community property which had not been divided at the time of the divorce" (quoted from respondent's brief in the Circuit Court).

In view of the foregoing, it is respectfully submitted (a) that petitioner had no duty to show that her husband was not released from his natural obligation to support her; (b) that respondent had the duty to show release and has not done so; (c) that Texas law provides continuing liability in petitioner's husband; and (d) in any event, that the presumption of continuing liability must lead to a holding that petitioner's husband, and not petitioner, is taxable on the annuity payments received by petitioner in lieu of support and maintenance.

CONCLUSION

For the reasons heretofore assigned, it is respectfully submitted that the decision below was incorrect and should be reversed.

Respectfully submitted,

GORDON S. P. KLEEBERG,
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Supreme Court of the United States

October Term, 1941

No. 306

JOSEPHINE S. PEARCE

Petitioner

against

COMMISSIONER OF INTERNAL REVENUE

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's arguments for complete absolution of the husband under Texas law, set forth on pages 17 to 25 of his brief, we respectfully submit, fall short of sustaining the proposition contended for.

Having stated:

> "The petitioner's brief cites no cases in which Texas courts have • • • revised a division of property or an allowance for support after the divorce action has been finally closed and judgment rendered. It is believed that no such cases can be found in the Texas courts." (p. 20, respondent's brief),

respondent refers to the cases of *Gray* v. *Thomas*, 83 Tex. 246 and *Whetstone* v. *Coffey*, 48 Tex. 269, cited by us on page 14, our main brief.

In the *Whetstone* case, the Court said at page 276:

> "It would seem, that, as between her and her husband, it would be equally reasonable that she should not be debarred of her rights in the community property, where neither she nor he brought the property in question in the suit for divorce."

The *Gray* case is to exactly the same effect. Even the *Keller* case (*Keller* v. *Keller*, 135 Tex. 260) cited by respondent on page 20 of his brief holds likewise. In that case there was an agreement made in contemplation of divorce; the agreement divided certain property between husband and wife and it was incorporated in the divorce decree entered a little more than a month later. Subsequently at the suit of Mrs. Keller, the Court divided "an undivided item of community property" (a sum of $20,000) which had not been mentioned in the settlement agreement nor in the decree.

It should be emphasized that in none of these three cases was there any claim of fraud or error, judicial or clerical (see distinction among errors made on page 23, respondent's brief), or even error on the part of either of the parties or both.

Respondent's footnote on page 21 seeks to nullify the effect of the said authorities by stating that they dealt with community property of which, he says, there was none in the instant case. To begin with, the record is silent as to whether there was or was not community property here, but more significantly, respondent's own comments on page 19 of his brief (that in the cases where the Texas courts give monthly or annual allowances to a wife, they do not grant alimony as such, but "merely give effect to

an equitable and convenient division of the parties' property") destroy whatever value said footnote might otherwise have. For that being so, the *Gray, Whetstone* and *Keller* cases stand for the proposition that the Court may at anytime after the divorce decree impose upon the husband additional or new obligations of periodic payments.

Whether we call periodic payments which (by now, it is clear no one disputes) the Texas Courts may provide for, alimony, which is a burden *in personam*, or a "convenient division of the parties' property", *i. e.*, a burden *in rem*, we respectfully submit is immaterial when the time arrives to apply the formula of *Helvering* v. *Fitch*, 309 U. S. 149, that it must appear "that local law * * * have given the divorced husband a full discharge and leave no continuing obligation however contingent" before the wife may be saddled with taxes.

As This Court put it in *Douglas* v. *Willcuts*, 296 U. S. 1, 8:

> "However designated, it was a provision for annual payments to serve the purpose of alimony, that is, to assure to the wife suitable support. The fact that the provision was to be in lieu of any other interest in the husband's property did not affect the essential quality of these payments."

A comment should be made about the case of *Helvering* v. *Fuller*, 310 U. S. 69, cited and referred to on page 8, respondent's brief. In that case, there was absolutely no question that

> "the Nevada court retained no power to alter or modify the divorce decree. It seems to be *admitted* that under Nevada law the wife's allowance once made is final" (quoted from the opinion, p. 73; emphasis ours).

This is far from the situation here.

With regard to the effect of New York law discussed on pages 15 to 17, respondent's brief, it should be observed that *Kroner* v. *Kroner*, 23 N. Y. Supp. (2d) 670 cited on page 15 of that brief has absolutely no relevancy. It certainly does not even purport to contend for the proposition that the divorced Mr. Pearce could not be required by the courts of New York to support his former wife should the necessity therefor develop. On the other hand, the case of *Riemer* v. *Riemer* to which the said page 15 invites attention does hold that a wife may sue her husband (previously divorced at her instance in a Massachusetts court) for necessaries, and hold him.

We have not been able to discover any authorities construing the effect upon this question of § 125 of the New York Public Welfare Law, but the whole direction of the section seems to be to avoid, if at all possible, burdening the Public Welfare authorities with the expense of maintaining a person about to become a public charge, and even husbands who have been abandoned by their wives have been held liable (*Jones* v. *Jones*, 161 Misc. 660); wives have been held responsible for the keep of their husbands (*Hodson* v. *Picker*, 159 Misc. 356; *Hodson* v. *Stapleton*, 248 App. Div. 524); and grandparents for the keep of their grandchildren (*Calhoun* v. *Calhoun*, 256 App. Div. 672).

Whatever the effect of New York law may be, we say that it is clear from all of the discussion about Texas law in our briefs and even in respondent's brief, that under Texas law there is a continuing liability, albeit contingent—or at least doubt and uncertainty on the subject, with regard to the effect of which enough has already been said in the main briefs of both parties.

It is clear that the annuity agreement is, as we have stated on page 6, our main brief, "nothing more than a substitution of one form of security for another, • • • a plan whereby petitioner received moneys in satisfaction of all claims she might have against her husband for support."

It is certainly not "tantamount to a transfer of a lump sum or income-producing securities" as asserted on pages 5, 9 and 10, respondent's brief. Such a capital transfer would have been subject to the control and the caprice of petitioner; it would have the attributes of property which she could have retained in the form of money or other property or converted into that form.

More convincingly, the annuity might be likened to and viewed as an irrevocable trust. While, once established, the husband could not control it, nevertheless, the wife, petitioner herein, never at any time could do that. Before the annuity was established, it was the husband's choice whether he would or would not establish the annuity (pp. 20-21, Record). When he did exercise the choice by establishing the annuity, he merely created another device whereby to meet his continuing obligation to support.

In *Douglas* v. *Willcuts, supra* (296 U. S. 1), THIS COURT said at page 9:

> "We have held that income was received by a taxpayer, when, pursuant to a contract, a debt or other obligation was discharged by another for his benefit. The transaction was regarded as being the same in substance as if the money had been paid to the taxpayer and he had transmitted it to his creditor (citing cases). * * * The creation of a trust by the taxpayer as the channel for the application of the income to the discharge of his obligation leaves the nature of the transaction unaltered. Burnet *v.* Wells, *supra.* In the present case, the net income of the trust fund, which was paid to the wife under the decree, stands substantially on the same footing as though he had received the income personally and had been required by the decree to make the payment directly."

Respectfully submitted,

GORDON S. P. KLEEBERG,
Attorney for Petitioner.

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46165—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 306

JOSEPHINE S. PEARCE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 34–36) is reported in 42 B. T. A. 91. The opinions of the Circuit Court of Appeals (R. 49–52) are reported in 120 F. (2d) 228.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 4, 1941 (R. 53). The petition for a writ of certiorari was filed July 24, 1941. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether payments received by taxpayer under a standard annuity contract purchased for her by her divorced husband in accordance with a pre-divorce agreement are includable in her gross income, or whether they constitute income attributable to her husband because in discharge of his continuing obligation to support taxpayer.

STATUTES INVOLVED

Revenue Act of 1934, 48 Stat. 680:

> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> [U. S. C., Title 26, Sec. 22.]

Section 22 (a) of the Revenue Act of 1936, 49 Stat. 1648, contains provisions identical with the above.

Vernon's Texas Civil Statutes (1940 ed.), Vol. 13, Art. 4638:

> The court pronouncing a decree of divorce shall also decree and order a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate.

STATEMENT

The taxpayer separated from her husband in 1913 while both were living in New York City (R. 13, 35). A separation agreement was executed in that year, and was amended in 1916 by a supplemental agreement. By virtue of the supplemental agreement, the taxpayer's husband agreed to pay the taxpayer $500 each month for the life of the agreement. It further provided that the agreement would terminate if he deposited with a trustee an annuity contract, issued by a recognized life insurance company, calling for the payment of $500 per month to the taxpayer for life (R. 30). In 1917, the taxpayer obtained a decree of absolute divorce in Texas. The taxpayer's husband entered his personal appearance in the action (R. 14, 35). The court's decree was silent in respect of alimony, any property settlement, maintenance, or the reservation of jurisdiction for such purposes (R. 17). The marriage had been childless (R. 35).

Shortly after the divorce, an annuity contract calling for the payment of $500 per month to the taxpayer during her life was purchased by the taxpayer's former husband in consideration of a single premium of $82,953.53 (R. 15).

In reporting gross income for 1935 and 1936, neither the taxpayer nor her former husband included the $6,000 received by the taxpayer from the insurance company in each of those years. The Commissioner sent deficiency notices to both parties, and both appealed to the Board of Tax Appeals. At the hearings, the Commissioner contended that only the taxpayer should report the payments as income. The Board sustained the Commisisoner's contention (R. 35–36). Mrs. Pearce, the taxpayer herein, appealed to the Circuit Court of Appeals for the Second Circuit, which affirmed the decision of the Board (R. 53).

ARGUMENT

1. The conflict alleged is the failure of the court below properly to apply the decisions in *Douglas* v. *Willcuts*, 296 U. S. 1, and *Helvering* v. *Fitch*, 309 U. S. 149. In the *Fitch* case, this Court pointed out that a husband, in order to escape taxation on income from an alimony trust pursuant to the rule of the *Douglas* case, must sustain the burden of showing that he was completely discharged under the applicable state law. Since Fitch was unable to dispel the Court's uncertainty respecting the

state law, he was held liable for the taxes imposed on the trust income received by his wife. Where there is no doubt under state law, however, that the husband has been completely discharged, he does not pay the taxes on the trust income. *Helvering* v. *Fuller,* 310 U. S. 69; *Fitch* v. *Commissioner,* 43 B. T. A. 773.

When the Commissioner determines that a husband is liable for such taxes, the burden is placed on the husband to show by "clear and convincing proof" in an appropriate proceeding that his obligation to support has been fully and finally discharged. *Helvering* v. *Fitch, supra.* Conversely, when the Commissioner has determined that the wife should pay the taxes and she contests such determination, the rule of the *Fitch* case would seem to require that she demonstrate by "clear and convincing proof" that her husband was not fully and finally discharged.[1] In short, the rule of the *Fitch* case seems simply an outgrowth of the familiar requirement that the contesting taxpayer must sustain the burden of establishing his position. Thus, in the instant case, the court below correctly held that Mrs. Pearce must pay the taxes because she failed to show that her husband was not discharged by the

[1] It may be suggested that the result is harsh since the state law is rarely likely to be explicit and the Commissioner has his choice of which of the two parties to tax. But cf. *Helvering* v. *Fuller,* 310 U. S. 69; *Fitch* v. *Commissioner,* 43 B. T. A. 773.

settlement. The terms of the instrument itself purport to relieve him of liability upon purchase of the annuity (R. 27–31). The Board of Tax Appeals and all the judges of the court below have stated that the law of Texas is so uncertain that one can only speculate concerning the power of Texas courts to affect a husband's liability to support many years after the granting of a divorce (R. 36, 52). Therefore, Mrs. Pearce has failed in the proof necessary to the success of her action.

2. Even assuming that, since both the taxpayer and the former husband petitioned for redetermination of the deficiencies,[2] the conflicting presumptions which arose eliminated each other and put the issues before the Board for decision without them, it is submitted that the Board's decision was correct. The general rule is naturally that one who in fact receives income must pay the tax on the income. But if the income discharges an obligation of another person, it will be attributed for tax purposes to the obligor, under the rule of *Douglas* v. *Willcuts*, 296 U. S. 1. The taxpayer in the instant case has referred (Pet. 13, 14) to "the general rule" of that case. She contends that the Commissioner had the burden of showing that the

[2] The Commissioner took the position that Mrs. Pearce was the proper person to pay the taxes, but in order to protect the Government's interest (R. 35, 50), he asserted the deficiency against both parties.

annuity payments were not received in discharge of the husband's continuing obligation. The general rule of the *Douglas* case, however, is not called into operation unless there is a continuing obligation, which warrants attributing receipt of the payments to one who does not actually receive them. There has been no showing here that there was a continuing obligation.[3] The Board, there-

[3] Although it is the contention of the Commissioner that the Texas courts have no power to require a divorced husband to make additional contributions and that Mr. Pearce was completely discharged, at the very least sufficient doubt exists regarding the Texas law to justify classifying the instant case in this respect with *Helvering* v. *Fitch*, 309 U. S. 149, and thus imposing the burden on the taxpayer. The applicable Texas statute contains no reference to a continuing liability of a husband for the support of his wife. Vernon's Texas Civil Statutes (1940 ed.), Vol. 13, Art. 4638, *supra*. This statute has been unchanged during the entire period involved herein. See Revised Civil Statutes of Texas (1911), Art. 4634. The only case cited by the taxpayer in support of the claim that the courts retain power to award support to a wife or to amend a decree in that respect, except where community property had not been correctly divided at the time of the divorce, is *Cannon* v. *Cannon*, 43 S. W. (2d) 134 (Civ. App. San Antonio), error dismissed 121 Tex. 634. In the *Cannon* case, it was clearly indicated that there was no continuing obligation on the part of the husband. The taxpayer cites the *Cannon* case on the theory that the dismissal of the writ of error meant disagreement with the reasoning of the lower court. But such a dismissal is ambiguous: It may signify either lack of jurisdiction or disagreement with the reasoning, though not the result, of the lower court. It is more likely that it meant the former. See *Burguieres* v. *Farrell*, 126 Tex. 209; *Insurance Co.* v.

fore, correctly affirmed the Commissioner's determination that she was liable for the taxes on the income which was actually paid to her.

CONCLUSION

The decision below is correct and there is no conflict; therefore, the petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
J. LOUIS MONARCH,
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Special Assistants to the Attorney General.

AUGUST 1941.

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No. 306

In the Supreme Court of the United States

OCTOBER TERM, 1941

JOSEPHINE S. PEARCE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 306

JOSEPHINE S. PEARCE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 24–25) is reported in 42 B. T. A. 91. The opinions of the Circuit Court of Appeals (R. 33–36) are reported in 120 F. (2d) 228.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 4, 1941. (R. 37.) The petition for a writ of certiorari was filed July 24, 1941, and was granted October 13, 1941. The jurisdiction of this Court is invoked under Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer received payments under a standard annuity contract purchased for her by her divorced husband in accordance with a predivorce agreement. Should these payments be included in her gross income?

STATUTES INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * (U. S. C., Title 26, Sec. 22.)

Section 22 (a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, contains provisions identical with the above.

Vernon's Texas Civil Statutes (1940 Ed.), Vol. 13, Art. 4638:

> The court pronouncing a decree of divorce shall also decree and order a division

of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate.

STATEMENT

The petitioner separated from her husband in 1913. (R. 24.) Both were then living in New York City, and were still living there during the years involved herein. (R. 9, 33.) When they separated, an agreement providing for monthly payments by the husband for the support of the petitioner was executed. This agreement was amended in 1916 by a "Supplemental Agreement". By virtue of this supplemental agreement, the husband agreed to pay the petitioner $500 each month for life, or until termination of the agreement prior to her death. The husband was given the option to terminate the arrangement by purchasing an annuity contract, issued by a recognized life insurance company, calling for the payment of $500 per month to the petitioner for the remainder of her life. (R. 24.)

The petitioner in 1916 went to Texas and there filed a suit for divorce. Her husband entered his personal appearance in the action, and a decree of absolute divorce was entered in 1917. Neither alimony nor any other property settlement was mentioned in the decree. There were no children. (R. 24.)

Shortly after the granting of the divorce, the husband purchased an annuity for the petitioner's benefit from the Travelers Insurance Company of Hartford, Connecticut. This annuity called for the payment of $500 per month to the petitioner for life. (R. 24–25.)

In reporting gross income for 1935 and 1936 neither the petitioner nor her former husband included the $6,000 received by her under the annuity contract in each of those years. The Commissioner sent deficiency notices to both the petitioner herein and her former husband, and both appealed to the Board of Tax Appeals. At the hearing the Commissioner contended that the former wife should report the payments as her income, and the Board sustained this contention. (R. 25.) The petitioner appealed to the court below, which affirmed the decision of the Board (R. 37.)

SUMMARY OF ARGUMENT

I

The rule of *Douglas* v. *Willcuts*, 296 U. S. 1, is an exception to the general principle that the person who physically receives income must pay income taxes thereon. In order to bring herself within this exception, a divorced wife must show by clear and convincing proof that the property settlement effected at the time of the divorce did not give her husband a complete discharge of all liability to continue to contribute to her support.

The purchase of an annuity by the husband for the wife's benefit effects a complete discharge of his obligation, since it is tantamount to a transfer of a lump sum or income producing securities.

If, after the Commissioner has determined that she must report income realized as a result of the divorce settlement, the wife fails to show that her husband was under a continuing liability to support her, she is liable for the taxes claimed. If the divorce settlement gave the husband a complete discharge under state law, or if the state law is uncertain, the Commissioner may properly rely on the general rule that the actual recipient of income must pay the tax. In this case, therefore, the divorced wife was properly held liable.

II

The husband was not subject to a continuing obligation to contribute to his wife's support, under the law of New York, where both parties were residing prior to the divorce and during the period when the income involved herein was received. There is no law in New York which requires a man to contribute to the support of a former wife, where the divorce was obtained in another state and the courts of such other state did not require him to support her.

There is no evidence that, under Texas law, a divorced husband may be required to make contributions to his wife's support after the divorce

has been granted. There is no power to allow permanent alimony. The applicable statute provides for an equitable division of the parties' property at the date of the divorce, but after the judgment has been rendered, the courts apparently may not make a further division or require the husband to contribute in any way to the support of his former wife. Although the law is not entirely clear on this subject, the available authorities indicate that a wife could not require additional support many years after the divorce decree had become final.

Since the petitioner can not prevail without showing by clear and convincing proof that her husband was not discharged, the probability that there was no continuing liability or the uncertainty in this respect indicate that the decision below should be affirmed.

ARGUMENT

I

IF UNDER APPLICABLE STATE LAW MR. PEARCE WAS COMPLETELY DISCHARGED OF ALL LIABILITY TO CONTRIBUTE TO HIS WIFE'S SUPPORT, THE ANNUITY PAYMENTS WERE NOT TAXABLE TO HIM AND SHOULD THEREFORE BE INCLUDED IN THE PETITIONER'S GROSS INCOME

1. The petitioner resists payment of these taxes on the theory that each annuity payment was a *pro tanto* discharge of her former husband's continuing obligation to support her. Consequently, she argues that the payments should be included

in his gross income, not hers. She insists that the rule of *Douglas* v. *Willcuts*, 296 U. S. 1, applies to the situation presented in this case. *Douglas* v. *Willcuts* furnished an exception to the general rule that he who physically receives income must pay the tax thereon. The exception is that each payment which discharges an obligation, no matter who receives it, is treated as the equivalent of income actually received by the obligor. In the *Douglas* case, the obligation being discharged was the husband's legal duty to contribute to his wife's support, continuing even after divorce. Cognate obligations are the duty to support minor children (*Helvering* v. *Schweitzer*, 296 U. S. 551, 665) and to pay taxes (*Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716) or a pre-existing debt (*Helvering* v. *Blumenthal*, 296 U. S. 552). Generally the obligation to support a divorced wife is imposed upon a husband by state law, but he may assume the duty voluntarily. His doing so will also render him liable for income taxes on any payments discharging the continuing obligation. *Helvering* v. *Leonard*, 310 U. S. 80; *Weir* v. *Commissioner*, 109 F. (2d) 996 (C. C. A. 3d) certiorari denied, 310 U. S. 637; *Barbour* v. *Commissioner*, 110 F. (2d) 660 (C. C. A. 3d) certiorari denied, 310 U. S. 628; *Glendinning* v. *Commissioner*, 97 F. (2d) 51 (C. C. A. 3d); *Alsop* v. *Commissioner*, 92 F. (2d) 148 (C. C. A. 3d), certiorari denied, 302 U. S. 767.

Until recently the Government contended that

all payments which operate to discharge the taxpayer's obligation, whether or not that obligation could be altered in any way, or whether or not it was fortified by a contingent liability to make up deficiencies, were income to the obligor. See brief for the petitioner in *Helvering* v. *Fitch,* 309 U. S. 149, No. 243, October Term, 1939, p. 15. However, the rule of *Douglas* v. *Willcuts,* as clarified by recent decisions of this Court, is not so extensive. See *Helvering* v. *Fitch,* 309 U. S. 149; *Helvering* v. *Fuller,* 310 U. S. 69; *Helvering* v. *Leonard,* 310 U. S. 80. In the *Fuller* case this Court specifically rejected the argument of the Government that the income of a trust created by a taxpayer in conjunction with a divorce proceeding is taxable to the husband merely because it discharged his obligation of support, whether or not he could be required to add to the amounts going to his former wife. This Court found the law of Nevada, where the divorce in that case was obtained, to be that a wife could not obtain additional support from her former husband after he has created a trust required by the decree or by an agreement incorporated in the decree, unless such agreement or decree expressly reserved the power to alter. The husband was said to be "completely discharged" when he established the trust. Consequently, the avails did not operate to discharge any obligation; whatever obligation existed was discharged when

the trust was originally created. These recent decisions of this Court have established that a divorced husband must report income from alimony trusts and the like only if such income discharged continuing liability created by contract or state law. If no such continuing liability exists, the income is that of the wife, who physically receives the payments.

2. In the instant case, as held by the Board in Mr. Pearce's case, *Douglas* v. *Willcuts* is inapplicable. Mr. Pearce abandoned the trust which was originally established and, exercising the privilege accorded by the mutual agreement executed prior to the divorce, purchased an annuity for a single lump sum payment. The agreement provided that, upon the purchase of an annuity, he would be completely discharged of all obligation to contribute to the support of the petitioner. (R. 20–21.) Therefore, there was no continuing liability arising out of the contract between the parties. Cf. *Commissioner* v. *Tuttle*, 89 F. (2d) 112 (C. C. A. 6th); *Helvering* v. *Leonard*, *supra*; *Weir* v. *Commissioner*, *supra*; *Barbour* v. *Commissioner*, *supra*; *Glendinning* v. *Commissioner*, *supra*; *Alsop* v. *Commissioner*, *supra*.

The situation herein would have been no different had Mr. Pearce turned over to the petitioner the sum of $82,953.50, the amount of the premium that he paid, and then Mrs. Pearce had purchased

the annuity on her own initiative. The payments received by Mrs. Pearce from such an annuity purchased by her would not have been included in Mr. Pearce's income, for they could hardly be said to be intended as a discharge of an existing obligation. The lump sum payment would have been made for that purpose. The purchase of an annuity for another is more like the transfer of a lump sum than the creation of a trust for the devotion of future income to discharge an obligation or fulfill some other purpose. It was as though Mr. Pearce had bought an income bearing security and given it to his wife. He would not be required to include such income in his return. See *Helvering* v. *Fuller*, 310 U. S. 69, 74.[1]

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[1] In attempting to enact into the Revenue Act of 1941 a uniform method of taxing the proceeds of divorce and separation settlements, the Senate included a provision that specifically taxed such payments as are involved herein as part of the income of the divorced wife who actually received them. Section 117 (a) of Revenue Act of 1941, as introduced in the Senate on September 2, 1941. The operation of the provision was illustrated in part as follows (S. Rep. 673, 77th Cong., 1st Sess., p. 33): "(4) A divorce decree requires Mr. D to pay to Mrs. D, his former wife, $500 a month. To meet this obligation, Mr. D purchases an annuity for the life of his divorced wife which will pay her $500 a month. Under the provisions of section 22 (k) and notwithstanding the provisions of section 22 (b) (2), the full $500 a month received by Mrs. D is includible in her gross income and no part of such amount is includible in the gross income of Mr. D or deductible by him from his gross income." The entire provision was deleted in conference with the understanding that it would be considered later in a bill intended to deal with administrative matters. H. Rep. 1203, 77th Cong., 1st Sess., p. 11.

3. By sending a deficiency letter to the petitioner, the Commissioner placed upon her the burden of showing that she did not owe the taxes claimed. This she could do by demonstrating that the payments on which they were based came to her in discharge of her former husband's continuing obligation of support. The burden of proving this effect of the payments was hers (*Welch* v. *Helvering*, 290 U. S. 111, 115), and failure of proof meant that she must lose her appeal. To sustain her burden, she had to show "by clear and convincing proof" that her former husband remained liable to contribute further to her support during the taxable years involved. Cf. *Helvering* v. *Fitch, supra.* The Board found that she failed to do this, and sustained the Commissioner's determination. The court below agreed that she failed to sustain her burden of demonstrating to it that Texas law imposed a continuing liability on her husband. Her failure is illustrated by the agreement of all the judges that the law of Texas was left uncertain. Perforce, affirmance of the Board's decision for the Commissioner followed from this conclusion.

However, the petitioner, supported by the dissenting opinion of Judge Learned Hand, argues that *Helvering* v. *Fitch, supra,* means that the husband is to be taxed on the income from an alimony trust or its equivalent unless there is clear and convincing evidence that the particular financial settlement effected a complete discharge of

his obligation to support his former wife. (Br. 6.) This argument assumes the existence of a presumption of continuing obligation, so that the "general rule" would be that *Douglas* v. *Willcuts* applied to every divorce settlement unless the contrary were shown affirmatively. The husband's inability to dispel uncertainty as to the local law would then amount to a failure to overcome this presumption and would mean that the husband pays the taxes.

This interpretation of the *Fitch* case is erroneous. The taxpayer there was the husband, and it was *his* burden to show that the Commissioner's determination of a deficiency in his taxes was wrong.[2] Whatever presumption existed applied only to the correctness of the Commissioner's determination. Such a presumption in that case had the effect of imposing on the *husband* the burden of showing, by clear and convincing proof, that he was completely discharged. The same presumption in the instant case, where the *wife* is the taxpayer, imposes on her the burden of showing that the husband was not completely discharged, in order to relieve her of the taxes claimed by the Commissioner. In *Helvering* v. *Leonard* this Court stated (310 U. S. at 86) that:

> In *Helvering* v. *Fitch, supra,* we stated that where the *divorced husband* desires to avoid the general rule expressed in *Douglas* v. *Willcuts, supra,* he carries a distinct burden

[2] The Commissioner's position in the *Fitch* case was based on a determination that under Iowa law Mr. Fitch was not completely discharged.

> of establishing not by mere inference and conjecture but by "clear and convincing proof" that local law and the alimony trust have given him a full discharge. * * * (Italics supplied.)

The taxpayer's argument overlooks the importance of the fact that this Court was dealing with a divorced *husband* in quoting from the *Fitch* case. If the words "divorced wife" were inserted in place of "divorced husband", the remainder of the quotation would also have to be changed. A divorced wife, as in the instant case, would be unlikely to desire to "avoid the general rule expressed in *Douglas* v. *Willcuts*", because such avoidance would result in application of the even broader rule that the actual recipient of income—here, the wife—must pay the tax. Therefore, if this Court agrees with the court below that only "doubt and uncertainty" appear in response to the question of Mr. Pearce's continuing obligation, under the rule of the *Fitch* case the decision herein should be declared correct. Of course, if the uncertainty is changed to certitude that Mr. Fitch was fully discharged, the decision would *a fortiori* have to be affirmed.

4. When the instant case was before the Board of Tax Appeals, the appeals of both the petitioner herein and her former husband were presented simultaneously. The Commissioner, for his own protection, had asserted deficiencies against both, including in the income of each the same pro-

ceeds of the annuity. It was conceded, however, that only one of them was liable for the taxes thereon. The Commissioner suggested that the payments should be deemed income to Mrs. Pearce and not to her former husband. (R. 25.) The Board agreed with this view.

In presenting the case to the Board, each taxpayer had the burden of overcoming the presumptive correctness of the Commissioner's determination of his or her deficiency. However, the success of one of the taxpayers in this respect could only spell the failure of the other, since clearly one—but only one—had to report this income. The Board held that *Douglas* v. *Willcuts* did not apply. The result was to decide Mr. Pearce's action in his favor and to hold for the Government against Mrs. Pearce. *Pearce* v. *Commissioner,* unreported memorandum opinion entered June 14, 1940; (R. 24–26). On two grounds this result seems amply justified in this case: first, that the applicable state law is not clear and convincing, and second, that, if any rule can be gleaned from the Texas authorities, it is that Mr. Pearce was completely discharged when he purchased the annuity.

II

MR. PEARCE WAS NOT UNDER A CONTINUING LIABILITY TO CONTRIBUTE TO THE PETITIONER'S SUPPORT

Both Mr. and Mrs. Pearce were living in New York before the divorce was granted and again

during the years involved in this proceeding. (R. 8, 9.) The divorce was obtained in Texas. Consequently, the law of both states is material to a determination of whether there exists a continuing liability to support.

1. In New York Mr. Pearce's status was that of an unmarried man, divorced from his wife by a valid decree of a court of another state. Only if the courts of New York could require such a man to support his former wife was there any possibility of a continuing obligation with respect to the law of that state. Clearly, there is no such power. See *Kroner* v. *Kroner*, 23 N. Y. Supp. (2d) 670 (Dom. Rel. Ct.). But see *Riemer* v. *Riemer*, N. Y. City Ct., Kings Co., N. Y. L. J., May 4, 1940, p. 2047. The New York Civil Practice Act, which contains the provisions for support in connection with divorce proceedings, and the New York Public Welfare Law (McKinney, Vol. 47B) and the Domestic Relations Court Act of the City of New York (McKinney, Criminal Code, Vol. 66, pp. 1375–1448), which prescribe general rules of family support, have no references to such liability.

The decree of the Texas court that granted the divorce in this case contains no provision for support or division of property. Although New York courts retain power to require a former husband to contribute to his divorced wife's support at any time, notwithstanding the failure to include such an order in the original decree, their power extends

only to divorces granted by courts in that state. Civil Practice Act, Section 1170. The effect of this section is to include in every decree of divorce entered by New York courts a reservation of the right to increase or decrease the amount of support accorded the wife. *Fox* v. *Fox,* 263 N. Y. 68, 70. See also *Helvering* v. *Leonard,* 310 U. S. 80. The various other statutes in New York relating to support contain no reference to a divorced wife. Cf. New York Public Welfare Law, (McKinney, Vol. 47B) Section 128; Domestic Relations Court Act of the City of New York, Sec. 91 (McKinney, Vol. 66, p. 1416); *Milone* v. *Milone,* 160 Misc. 830 (N. Y. Dom. Rel. Ct.). The absence of such provisions may be contrasted with the power of New York courts to require a man to support his children regardless of his status respecting his wife. See *Mallina* v. *Mallina,* 167 Misc. 343 (N. Y. Dom. Rel. Ct.).

State courts have no power to order the support of a divorced wife if such act would amount to a refusal to give full faith and credit to a final and valid decree of a court in another state. *Yarborough* v. *Yarborough;* 290 U. S. 202. The judgment of the court of one state requiring alimony payments by a husband must be enforced, when sued upon in another state. *Sistare* v. *Sistare,* 218 U. S. 1. Conversely, a decree of divorce which, like the one herein, contains no provision for support of the wife cannot be, in effect, amended by a court in another state imposing such an obliga-

tion.[3] Therefore, Mr. Pearce was under no liability, through any possible action of the courts of New York, to add to the amount he had paid for the annuity he bought for his wife's support.

2. The brief for the petitioner draws upon "mere inferences and vague conjectures" to support the argument that, under Texas law, Mr. Pearce was subject to a continuing liability to contribute to the petitioner's support. But the decisions indicate that a decree of divorce in Texas cannot be amended and warrant the conclusion that no order to support could ever be appended to the simple judgment of divorce appearing in this record. (R. 11–12.) Since this judgment contained no division of the property of the parties or order requiring Mr. Pearce to contribute to the petitioner's support, any later judgment effecting such division or imposing such a duty would be tantamount to the entry of a new judgment. The Texas court would have no power to do this. See *Cannon* v. *Cannon,* 43 S. W. (2d) 134 (Civ. App., San Antonio), error dismissed, 121 Tex. 634. The law respecting the power of Texas courts to alter the provisions for support in a divorce decree appears to have been stated in *Phillips* v. *Phillips,* 203 S. W. 77 (Civ. App., Ft. Worth). In that case a husband succeeded in having a judgment of di-

[3] If there were a common law or statutory duty to support a divorced wife, the New York courts might order it despite the silence of the court granting the divorce in another state. Cf. *Laumeier* v. *Laumeier,* 237 N. Y. 357.

vorce reopened and the division of the parties' property set aside because the husband had not received proper notice of the proceedings. This was like reopening a judgment because of fraud or misrepresentation (see, e. g., *Ralls* v. *Ralls*, 256 S. W. 688 (Civ. App., Amarillo), error dismissed, 115 Tex. 617), and is not the type of reopening or amending which this Court considered in the *Fitch, Leonard* and *Fuller* cases. Cf. *Helvering* v. *Leonard*, 310 U. S. 80. They were concerned only with the power of the local courts to alter or amend after entry of a valid judgment or decree. With respect to such power, the court in the *Phillips* case made the following remark (p. 79):

> In this state the legal duty of the husband to support his wife ceases upon the severance of the marital bonds, nor has a court the power to decree that a husband or his property may be subjected to such support after divorce. Permanent alimony is not provided for by Texas statutes.

The only source of authority for the granting of any support to a divorced wife in Texas is Article 4638 of the present Revised Civil Statutes, which has been unchanged during all the time involved herein.[4] See Vernon's Texas Civil Statutes, Vol.

[4] The Texas statute is strikingly similar to the Nevada law which was before this Court in *Helvering* v. *Fuller*, 310 U. S. 69. Sections 9463 and 9465 of Nevada Compiled Laws, 1929. These sections were found to mean that a divorced wife's allowance once made is final, unless the power to amend was reserved by the decree or the settlement.

13, Art. 4638; Revised Civil Statutes of Texas (1911), Art. 4634. This article states that the court may order "a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any." There is no power to grant alimony to be paid after the divorce has been granted.[5] *Ex parte Guinn,* 121 Tex. 66; *Pape* v. *Pape,* 13 Tex. Civ. App. 99, error dismissed, 93 Tex. 716; *Boyd* v. *Boyd,* 22 Tex. Civ. App. 200. See also *Ogg* v. *Ogg,* 165 S. W. 912, 913 (Civ. App., San Antonio); *Phillips* v. *Phillips, supra; Cunningham* v. *Cunningham,* 120 Tex. 491. Although alimony may be allowed during the pendency of the suit (Art. 4637), the power is strictly limited to that situation. *Martin* v. *Martin,* 17 S. W. (2d) 789 (Com. App., Sec. A). The taxpayer's brief (p. 12) cites other cases which involve the payment of a monthly or annual sum to the wife. However, in those cases the courts expressly deny that they are granting alimony. The judgments merely give effect to an equitable and convenient division of the parties' property, and the payments are to be made only out of the income from the property interests of the husband. See, e. g., *Berg* v. *Berg,* 115 S. W. (2d) 1171, 1172 (Civ. App., Ft. Worth),

[5] *Wiley* v. *Wiley,* 33 Tex. 358, decided in 1870, seems to conflict with the rule stated in the later cases, although possibly the alimony there granted was actually a charge only against the husband's property, and not a debt.

error dismissed, 129 Tex. 672; *Keton* v. *Clark*, 67 S. W. (2d) 437, 440–441 (Civ. App., Waco), error refused, 123 Tex. 636; *Clark* v. *Clark*, 35 S. W. (2d) 189, 190 (Civ. App., Waco), error dismissed, 121 Tex. 637. Of course, if the parties agree between themselves that the division of property shall take the form of periodic payments, and such agreement is approved by the court, it will be enforced. See *Johnson* v. *Johnson*, 14 S. W. (2d) 805 (Com. App., Sec. B); *Levy* v. *Goldsoll*, 62 Tex. Civ. App. 257, (5th Dist.), error refused, 62 Tex. Civ. App. 262. No installment payments were involved in *Scannell* v. *Scannell*, 117 S. W. (2d) 538 (Civ. App., Ft. Worth), and *Daniel* v. *Daniel*, 30 S. W. (2d) 801 (Civ. App., Ft. Worth).

Such an agreement may be altered to conform to the parties' true intention, if necessary, but this power does not extend to amendment at the instance of one party or on the court's initiative. *Keller* v. *Keller*, 135 Tex. 260.

The petitioner's brief cites no cases in which Texas courts have made or revised a division of property or an allowance for support after the divorce action has been finally closed and judgment rendered. It is believed that no such cases can be found in the Texas reports.

The common property of the husband and wife, not divided in the first instance, has been par-

titioned after divorce actions were closed, but these cases do not indicate that the courts indefinitely retain power to alter decrees. See *Gray* v. *Thomas,* 83 Tex. 246, 18 S. W. 721; *Whetstone* v. *Coffey,* 48 Tex. 269. In both these cases a wife was permitted to assert rights in community property which had not been divided at the time of the divorce.[4] See also *Kirberg* v. *Worrell,* 44 S. W. (2d) 940 (Com. App. Sec. A); *Keller* v. *Keller,* 135 Tex. 260 (Com. App., Sec. B). In *Keton* v. *Clark, supra,* the court found it unnecessary to decide whether or not a trial court could reserve the power to modify or discontinue stipulated monthly payments to be made out of the income from the husband's property. (67 S. W. (2d) p. 441.) The trial court in that case had refused to make any such alteration. Since the trial court in the instant case made no allowance for support, or division of property, it seems clear that it would have no power to do so at any future time. See *Whiteselle* v. *Northwestern Mut. Life Ins. Co.,* 221 S. W. 575, 576 (Com. App. Sec. B), where the court stated that a wife should assert all her claims to the husband's property during the divorce action or be satisfied with the division then made.

[4] Since there was no community property in the instant case, these authorities are clearly irrelevant.

The instant case should not be confused with cases involving the support and custody of children. Texas courts now hold that an award for the support of children may be amended at any time after it has been granted in a divorce proceeding. See *Wilson* v. *Underhill*, 131 S. W. (2d) 19 (Civ. App., Dallas); *Lacy* v. *Lacy*, 122 S. W. (2d) 1104 (Civ. App., Dallas); *Townsend* v. *Townsend*, 115 S. W. (2d) 769 (Civ. App., Dallas). These cases arose under Article 4639a of the Revised Statutes, which expressly gives the divorce court the power to alter or change judgments for the support of children. It is significant that previous to the enactment of this article the courts had the power to require the divorced father to support the children, but did not have the power to alter such a judgment or to allow support after the divorce action was closed. See *Bowyer* v. *Bowyer*, 130 Tex. 257 (Com. App., Sec. B), and *Cunningham* v. *Cunningham*, 120 Tex. 491. A similar rule still appears to exist in cases, like the one at hand, involving the support of the wife alone.

The petitioner has cited *Cannon* v. *Cannon*, 43 S. W. (2d) 134 (Civ. App., San Antonio), error dismissed, 121 Tex. 634, as an indirect authority for the proposition that a lower Texas court retains jurisdiction to alter a decree dividing the property of the parties after the case has been

closed. She maintains that at least it makes the question doubtful. The effect of doubt and uncertainty has already been discussed hereinabove.

Moreover, the *Cannon* case does not actually throw doubt on the question. There the former wife sought to have a divorce judgment amended in order to include certain stock in the inventory of property to be divided. The Court of Civil Appeals held that there was no jurisdiction to render a new judgment granting the request. Subsequently, another division of the Court of Civil Appeals explained the ruling by stating that the wife had attempted to correct a judicial rather than a clerical error, which was improper. *Bell* v. *Rogers,* 58 S. W. (2d) 878, 879–880 (Civ. App., Waco). At any rate, the *Cannon* case is a final judgment holding that the divorce decree could not be amended as requested. Such a judgment is binding on federal courts in interpreting state law. *Fidelity Trust Co.* v. *Field,* 311 U. S. 169; *Six Companies* v. *Highway Dist.,* 311 U. S. 180; and *West* v. *A. T. & T. Co.,* 311 U. S. 223.

The petitioner maintains that the action of the Supreme Court of Texas in dismissing the writ of error sought in the *Cannon* case throws doubt on the rule stated because it was tantamount to a disapproval of the reasoning of the Court of Civil Appeals, while indicating approval of the result reached. The Supreme Court noted that the writ

was "Dismissed for want of jurisdiction, April 6, 1932" (121 Tex. 634), which could have meant either disagreement with the reasoning below while approving the result, or a holding that the Supreme Court actually lacked jurisdiction. Vernon's Texas Civil Statutes, Vol. 3, Art. 1728. This is confirmed by the adoption of a rule by the Supreme Court in 1939, stating that thereafter the court would indicate disagreement with the lower courts' reasoning in reaching a correct result by placing the following notation on the petition: "Dismissed, W. O. J.—Correct Judgment." *Insurance Co.* v. *Ind. School Dist.*, 133 Tex. 545; *Wood* v. *Bankers Life & Loan Ass'n*, 132 Tex. 505. Before the adoption of this rule, the court was using the notation "Dismissed for want of jurisdiction" for cases in which it actually had no jurisdiction as well as the former type, those in which it disapproved the reasoning. It is more probable that the court dismissed the writ in the *Cannon* case because it actually lacked jurisdiction than because of disagreement with the reasoning below, since the Supreme Court of Texas could not grant a writ of error in divorce cases. Vernon's Texas Civil Statutes, Vol 4, Art. 1821, subdivision 3;[1] *Burguieres* v. *Farrell*, 126 Tex. 209. Therefore, if

[1] The Supreme Court may, however, answer questions certified by the Court of Civil Appeals in all cases. Vernon's Texas Civil Statutes, Vol. 4, Art. 1851. See *Hedtke* v. *Hedtke*, 112 Tex. 404.

the *Cannon* case is deemed in point, it supports the contention of the Commissioner rather than the petitioner.

CONCLUSION

The petitioner was correctly held liable for income taxes on the annuity payments which she received. The decision below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 306.—October Term, 1941.

Josephine S. Pearce, Petitioner, vs. Commissioner of Internal Revenue. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 9, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner and her husband separated in 1913. There was an agreement providing for monthly payments by the husband for her support. That agreement was amended in 1916 so as to provide monthly payments to her of $500 for life. Her husband, however, was given an option to terminate the arrangement by purchasing an annuity contract from a life insurance company which would pay petitioner $500 a month for the rest of her life. In 1917 petitioner obtained an absolute divorce in Texas, her husband entering a personal appearance. Neither alimony nor a property settlement was mentioned in the divorce decree. There were no children. Several months after the divorce Mr. Pearce purchased an annuity from an insurance company for petitioner's benefit. The annuity provided for a payment of $500 per month during her life.

Neither petitioner nor Mr. Pearce included the $6000 received by her under the annuity contract in their federal income tax returns for 1935 and 1936. The Commissioner sent deficiency notices to both of them. Each appealed to the Board of Tax Appeals. At the hearing the Commissioner contended that the payments were income of petitioner. The Board upheld that contention. 42 B. T. A. 91. The Circuit Court of Appeals affirmed the judgment of the Board, one judge dissenting. 120 F. 2d 228. We granted the petition for certiorari because of the manner in which that court applied the rule of *Helvering* v. *Fitch*, 309 U. S. 149, and *Helvering* v. *Leonard*, 310 U. S. 80, in case the ex-wife rather than the husband was sought to be taxed on alleged alimony payments.

The Circuit Court of Appeals reached the conclusion that petitioner was liable by the following line of reasoning. The determination of the Commissioner that the monthly payments were income of petitioner was presumptively correct; the burden to show error rested on petitioner. *Welch* v. *Helvering*, 290 U. S. 111, 115. Error might be shown by submitting "clear and convincing proof" (*Helvering* v. *Fitch*, *supra*, p. 156) that the payments were made pursuant to a continuing obligation of her former husband to provide for her support, so as to make the rule of *Douglas* v. *Willcuts*, 296 U. S. 1, applicable. The burden of establishing error is not sustained by a divorced wife merely by showing that an obligation of her former husband might have continued despite the divorce. Since it is doubtful and uncertain under Texas law whether petitioner's former husband was discharged of his marital obligation by the settlement in question, petitioner failed to show that the presumptively correct determination that she was liable was erroneous.

We do not think that that was a correct application of the rule of the *Fitch* and *Leonard* cases. Those cases hold that the income is taxable to the former husband not only where it is clear that payments to his ex-wife were made pursuant to a continuing liability created by his contract or by local law but also where his undertaking or local law makes that question doubtful or uncertain. Those cases, like *Douglas* v. *Willcuts*, *supra*, involved situations where the divorced husband was sought to be taxed on payments to his ex-wife. But the rule which they express supplies the criteria for determining, in absence of a different statutory formula, whether payments received by the ex-wife are properly taxable to her or to her divorced husband. If the Commissioner proceeds against the ex-wife, she sustains her burden of rebutting his presumptively correct determination merely by showing doubts and uncertainties as to whether the payments were made pursuant to her former husband's continuing obligation to support her. If the Commissioner proceeds against her former husband he sustains his burden by submitting clear and convincing proof that the payments were not made pursuant to any such continuing obligation. *Helvering* v. *Fuller*, 310 U. S. 69. The other course would make the liability of the divorced wife or the divorced husband wholly dependent on the election of the Commissioner to proceed against one rather than the other where, for example, local law was uncertain. But the

rule of *Douglas* v. *Willcuts, supra,* rests on a more substantial basis. Its roots are in local law and the undertakings of the husband. It calls for the use of the same criteria whether the husband or the wife is sought to be taxed.

We think, however, that petitioner has not maintained her burden in this case. Her former husband was not under a continuing contractual obligation to contribute to her support. For the agreement made in 1916 provided for the termination of his personal obligation to make payments to her in the event that he purchased the designated annuity. And so far as Texas law is concerned, she has not maintained her burden. Her showing as to Texas law is illustrated by the following.

By statute in Texas alimony may be awarded during the pendency of a suit for a divorce "until a final decree shall be made in the case". 13 Vernon's Civil Stats., Art. 4637. "This statute is exclusive in its very nature, and no alimony can be decreed by any court in this state except under its express terms." *Martin* v. *Martin,* 17 S. W. 2d 789, 791-792. It has been broadly stated in *Phillips* v. *Phillips,* 203 S. W. 77, 79 that, "In this state the legal duty of the husband to support his wife ceases upon the severance of the marital bonds, nor has a court the power to decree that a husband or his property may be subjected to such support after divorce. Permanent alimony is not provided for by Texas statutes." And see *Pape* v. *Pape,* 13 Tex. Civ. Rep. 99; *Boyd* v. *Boyd,* 22 Tex. Civ. Rep. 200. It is, however, provided by statute that the divorce court shall order "a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any." 13 Vernon's Civil Stats., Art. 4638. That power extends not only to community property but to the separate property of the husband. *Ex parte Scott,* 133 Tex. 1; *Clark* v. *Clark,* 35 S. W. 2d 189; *Berg* v. *Berg,* 115 S. W. 2d 1171; *Keton v. Clark,* 67 S. W. 2d 437. At times the divorce court has made such a division of the estate as apparently to impose on the husband a personal obligation to make stated payments to his wife. *Wiley* v. *Wiley,* 33 Tex. 358. Furthermore, a divorce decree which does not settle the rights of the parties to community property may not preclude a subsequent suit by the wife to establish her rights in it. See *Gray* v. *Thomas,* 83 Tex. 246. And the decree may be corrected to conform to the intention of the parties. *Keller* v. *Keller,* 135 Tex. 260. The power of the court to modify a property settlement previously approved, so as to

give the wife an interest in property not covered by the earlier decree, has been denied in absence of fraud or mistake. *Cannon* v. *Cannon*, 43 S. W. 2d 134. Petitioner challenges the reliability of the latter case because on appeal the case was dismissed for want of jurisdiction (121 Tex. 634), which meant either disagreement with the reasoning but approval of the result, or lack of jurisdiction. 3 Vernon's Civil Stats., Art. 1728. And see *Republic Ins. Co.* v. *School Dist.*, 133 Tex. 545.

We need not, however, endeavor to resolve that doubt. Nor need we speculate as to the power of the court at some future time to order a division of property in this case and as an incident thereto to impose on petitioner's husband a personal obligation as was apparently done by the divorce decree in *Wiley* v. *Wiley, supra*. See 6 Tex. L. Rev. 344 discussing *Helm* v. *Helm*, 291 S. W. 648. For even though petitioner established that the divorce court retained that broad power, not specifically reserved, and even though we assume that the power to make a division of property is the equivalent of a power to provide permanent alimony, she has not maintained her burden of rebutting the presumptively correct determination of the Commission that the income from this annuity contract was taxable to her. In order to maintain that burden she would have to show that it was at least doubtful and uncertain whether the Texas court, as an incident of its power to require the husband to support his wife, retained control over this annuity contract or the income from it. That at least is the result unless we are to broaden the base on which the *Fitch*, *Fuller*, and *Leonard* cases rest.

Those cases involved so-called alimony trusts. In each the trust was irrevocable. In each the husband had an obligation to support his wife.

In the *Fitch* case the trust provided that the wife was to receive during her life $600 a month from the income of the trust property; the husband, the balance. We held that the husband had not shown by "clear and convincing proof" that "in Iowa divorce law the court has lost all jurisdiction to alter or revise the amount of income payable to the wife from an enterprise which has been placed in trust. For all that we know it might retain the power to reallocate the income from that property even though it lacked the power to add to or subtract from the corpus or to tap other sources of income. If it did have such power, then it could be said that a decree approving an alimony trust of the kind here involved merely placed upon the pre-existing duty of the husband a par-

ticular and specified sanction." 309 U. S. at p. 156. And in speaking of the alimony trust involved in *Douglas* v. *Willcuts, supra,* we stated (pp. 151-152):

"It is plain that there the alimony trust, which was approved by the divorce decree, was merely security for a continuing obligation of the taxpayer to support his divorced wife. That was made evident not only by his agreement to make up any deficiencies in the $15,000 annual sum to be paid her under the trust. It was also confirmed by the power of the Minnesota divorce court subsequently to alter and revise its decree and the provisions made therein for the wife's benefit. Likewise consistent with the use of the alimony trust as a security device was the provision that on death of the divorced wife the corpus of the trust was to be transferred back to the taxpayer."

In the *Leonard* case income from the trust was to be paid to the wife for her life which together with income from other property was estimated at $30,000 a year. A separation agreement provided that the husband would pay his wife an additional $35,000 each year during her life so that her aggregate net income for the maintenance of herself and her children would be $65,000 a year. The separation agreement also provided that in the event the husband's ability to make the annual payment of $35,000 became impaired he might apply to a court for a reduction of his obligation of not less than $10,000 a year. We held that the husband had not sustained his burden of showing that "local law and the alimony trust" gave him "a full discharge" from his obligation to support his wife. 310 U. S., p. 86. The trust and the undertaking in the separation agreement were integral parts of an arrangement by which the "maintenance and support" of the wife "were secured". p. 85. We noted that it was not clear under New York law whether or not such a settlement could be remade by the court, though there was some authority which indicated that the divorce court's reserved power might be exercised "where the provision in the separate agreement, approved by the decree, is for support and maintenance". pp. 86-87. In view of that fact and the nature of the settlement, we concluded that the husband had not shown that the trust was not mere security for his continuing obligation to support his wife.

In the *Fuller* case it was clear under Nevada law that the court retained no control over the divorce decree which approved the trust settlement. Since there was no such reserved power and since the trust contained no contractual undertaking by the husband for

support of the wife, we concluded that his obligation to support had been *pro tanto* discharged. We held, however, that the husband was taxable on a $40 weekly payment which he had agreed to make to his wife. But that fact did not make him taxable on income from the trust also, since the provision for weekly payments and the trust "were not so interrelated or interdependent as to make the trust a security for the weekly payments." p. 73. We also noted (p. 76) that though "the divorce decree extinguishes the husband's preëxisting duty to support the wife, and though no provision of the trust agreement places such obligation on him, that agreement may nevertheless leave him with sufficient interest in or control over the trust as to make him the owner of the corpus for purposes of the federal income tax" under the rule of *Helvering* v. *Clifford*, 309 U. S. 331.

Thus a property settlement made for the purpose of maintaining or supporting the wife may be treated for income tax purposes as mere *security* for the husband's continuing obligation dependent on such considerations as whether it contains, or is interrelated with, contractual obligations of the husband for her support; whether the court has a reserved power to alter or modify it; or whether the husband retains any substantial interest in the property conveyed. Where the settlement carries some of the earmarks of a security device, then the power of the court to add to the husband's personal obligations may be especially significant. See *Helvering* v. *Leonard*, *supra*. But where, as here, the settlement appears to be absolute and outright and on its face vests in the wife the indicia of complete ownership, it will be treated as that which it purports to be in absence of evidence that it was only a security device for the husband's continuing obligation to support. There may be difficulty in placing a particular case on one side of the line rather than the other. But as stated by Mr. Justice Holmes in *Irwin* v. *Gavit*, 268 U. S. 161, 168, "That is the question in pretty much everything worth arguing in the law." And see *Harrison* v. *Schaffner*, 312 U. S. 579, 583.

As we have said, petitioner has made no showing whatsoever that the Texas court retained the power to reallocate the income from this annuity contract or to control it in any way as an incident of its power to require the husband to support the wife. She has not shown that the divorce court imposed any personal obligation on the husband in respect to the settlement in question. And she is not aided by those cases which enforce agreements of

the husband to make periodic payments to the wife. See *Johnson* v. *Johnson*, 14 S. W. 2d 805. There is no such agreement here. Proof that the Texas court might add to the husband's personal obligations as an incident to a future property settlement is no substitute for proof that the court had the power to remake this property settlement after it was consummated. Hence there is no ground for concluding that this settlement which is absolute on its face is mere security for an obligation of a husband to support his wife.

"The correct ground for refusing to tax such income to the husband is merely that it is the lump sum which discharges him and not the future income received by the wife." Paul, Five Years with *Douglas* v. *Willcuts*, 53 Harv. L. Rev. 1, 17, note 44. We noted in *Helvering* v. *Fuller*, *supra*, p. 74, that outright transfers of property to the wife, though providing for her maintenance and support, were no different from cases "where any debtor, voluntarily or under the compulsion of a court decree, transfers securities, a farm, an office building, or the like, to his creditor in whole or partial payment of his debt." We do not think that it would be proper to extend the rule of *Douglas* v. *Willcuts*, *supra*, to such a situation. The possibility that the divorce court might add to the husband's personal obligation does not alter the result. As in the *Fuller* case, the transfer of property to the wife might result only in a partial discharge of the husband's obligation. If the husband undertook, or was directed, to make other payments, he might be taxable on them. But the fact that he is taxable on a part of the payments received by the wife does not necessarily make him taxable on all. *Helvering* v. *Fuller*, *supra*, p. 73. Hence the statement in *Helvering* v. *Fitch*, *supra*, p. 156, that it must be clear "that local law and the alimony trust have given the divorced husband a full discharge and leave no continuing obligation however contingent" is to be read in light of the fact that the alimony trust in that case was deemed to be a mere security device for the husband's continuing obligation to support. For the husband was relieved from payment of the tax on income from the property settlement in the *Fuller* case though he had a continuing obligation to pay the wife $40 a week.

If the rule of *Douglas* v. *Willcuts*, *supra*, is not to be extended to this type of case, then on the showing which has been made the husband would have sustained his burden in case the Commissioner

had proceeded against him. Cf. *Mitchell* v. *Commissioner*, 38 B. T. A. 1336. Clearly then, the wife may not escape.

Such cases as *Helvering* v. *Horst*, 311 U. S. 112, *Helvering* v. *Eubank*, 311 U. S. 122, and *Harrison* v. *Schaffner*, *supra*, are not opposed to this result. Those cases dealt with situations where the taxpayer had made assignments of income from property. He was held taxable on the income assigned by reason of the principle "that the power to dispose of income is the equivalent of ownership of it and that the exercise of the power to procure its payment to another, whether to pay a debt or to make a gift, is within the reach" of the federal income tax law. *Harrison* v. *Schaffner*, *supra*, p. 580. But in those cases the donor or grantor had "parted with no substantial interest in property other than the specified payments of income". *Id.* p. 583. Here he has parted with the corpus. And "the tax is upon income as to which, in the general application of the revenue acts, the tax liability attaches to ownership." *Blair* v. *Commissioner*, 300 U. S. 5, 12. Finally, there is no barrier under the income tax laws to taxing the holder of an annuity on the income received, however his interest in the fund which produces the income may be described. Cf. *Irwin* v. *Gavit*, *supra*.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

MR. JUSTICE FRANKFURTER, dissenting.

The social fact that a husband is normally under a responsibility to provide for his wife even after they are divorced is the basis for the rule that monies received by a wife under a divorce settlement are presumed to be in discharge of a continuing obligation of the husband. I therefore agree with the decision of the Court to the extent that it reinforces this rule as a rule of policy, and not one of caprice varying with the sex of the taxpayer against whom the Commissioner chooses to proceed. I agree that if the Commissioner

proceeds against the wife, "she sustains her burden of rebutting his presumptively correct determination merely by showing doubts and uncertainties as to whether the payments were made pursuant to her former husband's continuing obligation to support her", and that if, on the other hand, the Commissioner determines that the payments are taxable to the husband, the latter sustains his burden only "by submitting clear and convincing proof that the payments were not made pursuant to any such continuing obligation." But I do not agree that the petitioner has failed to make the showing which is required under the rule professed by the Court.

Local law may provide that the transfer of property under a divorce settlement finally and definitively terminates a husband's obligation to support his wife, and that, once such a settlement is made, the wife loses her right to apply to a court for an order requiring the husband to support her. If the local law gives the settlement such effect, it is immaterial what the nature of the transferred property is. For in such a case the income derived from the property cannot be regarded as conferring any benefit upon the husband, and it is therefore taxable to the wife. On the other hand, local law may provide that even though a husband has made a complete, irrevocable transfer of property, he has nevertheless not obtained a full discharge of his marital obligations to his wife, and that, where circumstances in the future may warrant, a court can order the husband to make further contributions to her support. In such a case the husband is still under a "continuing obligation however contingent", *Helvering* v. *Fitch*, 309 U. S. 149, 156; *Helvering* v. *Leonard*, 310 U. S. 80, 84, and since the income received by the wife from the property contributes to her support and thus serves to discharge the obligation which under local law the husband still owes her, the income should be taxable to him. "The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid." *Helvering* v. *Horst*, 311 U. S. 112, 119; and see *Harrison* v. *Schaffner*, 312 U. S. 579.

The fact that the wife may, years after the settlement, have to go to court for an order requiring the husband to make additional payments for her support is of no legal consequence if the husband may be required to make such payments. A legal obligation may continue even though its burden is contingent upon future judicial action. A wife's receipt of income from property settled

upon her may make it unnecessary to her ever to apply for a court order. But it does not follow that unless and until she goes to court for such an order, her husband is under no legal obligation to support her. If the income from the property should dwindle to the point where the wife can no longer maintain herself, and the law has continued its hold upon the husband so that he may be required to make further contributions to her support, then plainly the husband is still under a "continuing obligation however contingent". The determinative fact is that the law has continued its hold upon the husband, not that it has reserved the power to modify the particular settlement.

It is utterly immaterial whether the property transferred was an irrevocable trust, as in the *Fitch* and *Leonard* cases, or an annuity contract, as we have here. For the annuity is taxable income, *Irwin* v. *Gavit*, 268 U. S. 161, and the procurement, by the husband's purchase, of its payment to his wife renders the annuity taxable income to him if it is in discharge of his obligation, quite as much as if he had procured the payment by creating a trust of his property. *Harrison* v. *Schaffner, supra.*

In every case the decisive inquiry is whether the husband's obligation subsists after the divorce settlement, or whether, as a result of the settlement, he is quits of his wife, once and for all, for better or for worse. If he is under a continuing obligation, the property transferred, whether it be an irrevocable trust or an annuity contract, is a security device only in the sense that it operates to secure the fulfillment of the obligation. If the fact that the husband has divested himself of control over the transferred property were determinative, certainly the *Fitch* and *Leonard* cases, at least, would have been decided the other way. For in each of these cases the husband conveyed an absolutely irrevocable trust, over which he had no greater control than the husband has over the annuity in the case before us. These cases show that if a husband is under a continuing obligation to support his wife, income from the property is taxible to him not because he has retained any interest in or control over the property, but because the income discharges *pro tanto* a legal obligation which he owes and thus confers a taxable benefit upon him. The ultimate criterion of taxability, therefore, is not whether a state court has reserved power to control the property transferred by a husband under a divorce settlement, but whether "the court lacks the power

to add to his personal obligations". *Helvering* v. *Leonard*, 310 U. S. 80, 87.

In law as in life lines have to be drawn. But the fact that a line has to be drawn somewhere does not justify its being drawn anywhere. The line must follow some direction of policy, whether rooted in logic or experience. Lines should not be drawn simply for the sake of drawing lines.

The decisions of this Court dealing with the question before us have turned upon whether local law was uncertain as to the existence of a continuing obligation on the part of the husband to support the wife. The opinion of the Court now introduces another element, namely, whether the local law is uncertain as to the power of the state courts to remake the particular settlement. This, it seems to me, has no valid relation to the basic principle of tax liability that "he who receives benefits should be taxed". Whether a husband is benefited from the payment of monies to his divorced wife depends upon his obligation to her which the payment of the monies served to discharge, not upon the nature of the wife's interest in the property he has transferred to her. To introduce such an unwarranted refinement is to clog the administration of the revenue laws.

But, in any event, all of the judges of the Circuit Court of Appeals were agreed that "the law of Texas is uncertain as to whether the taxpayer's husband discharged himself of his marital liability by the settlement at bar." 120 F. 2d 228, 230. This general uncertainty as to Texas law is controverted now not by controlling Texas authority but by extended argumentation and speculation. The Court suggests that had the Commissioner gone against the husband, he would have sustained the burden as heretofore defined, namely of showing, "by submitting clear and convincing proof", that under local law he was under no continuing obligation. Support for the proposition is drawn not from any Texas authority, whether statute or decision, but from a decision of the Board of Tax Appeals, *Mitchell* v. *Commissioner*, 38 B. T. A. 1336. But in that case there was a division of property between husband and wife, which included property belonging to the wife under an earlier arrangement entirely unrelated to the husband's marital obligations. The Board held that the income from such property could not, therefore, be taxed to the husband. As its opinion shows, the decision did not turn on the Texas law of divorce: "We think that

the trust income which was paid to her [the wife] was her separate income. It was not paid in satisfaction of any legal obligation of J. A. Mitchell [the husband] and it is not taxable to him." 38 B. T. A. at 1342.

The Court's exegesis of Texas law shows it to be no less uncertain than was the Iowa law in the *Fitch* case or the New York law in the *Leonard* case. The effect of the Court's ruling that the wife, in order to escape tax liability, must clearly establish that the state court has reserved the power to modify the terms of the particular property settlement is to reject the rule of policy enunciated earlier in its opinion. For there is no clear Texas authority, and under the rule of the *Fitch* and *Leonard* cases, which the Court does not purport to modify, the husband would be unable to show, "not by mere inference and conjecture but by 'clear and convincing proof'" (*Helvering* v. *Leonard, supra,* at 86; see *Helvering* v. *Fitch, supra,* at 156), that the payments made to his wife did not discharge a continuing obligation which he owed her. Therefore, liability under the tax law is made actually to depend upon whether the Commissioner elects to go against the husband or the wife. Having closed the front door to determination of tax liability by caprice, the Court allows caprice to enter through the back door of "presumption".

We brought this case here in order to clarify an important question arising under the federal revenue laws, not to re-examine the correctness of the lower court's finding regarding the uncertainty of Texas law as applied to this case. The general uncertainty of Texas law with respect to control over divorce settlements is conceded—and that is the decisive factor for our purpose. The absence of specific Texas authority dealing with such an annuity settlement as we have here does not lessen or remove that uncertainty, or justify us in making assumptions regarding the Texas law affecting such a settlement. Where prophecy as to a state court's ruling on its local law is not imperatively required of us, experience counsels abstention from prophecy. No ruling of ours can make Texas law.

I believe therefore that the judgment below should be reversed because of the ruling on federal law as to which we all agree, and that Texas law should be left where the Circuit Court of Appeals found it.

The CHIEF JUSTICE joins in this dissent.